

NUCLEAR WEAPONS AND THE RULE OF LAW

PAUL W. KAHN*

I. INTRODUCTION: ONE HUNDRED FIFTY YEARS OF LEGAL AND MILITARY ESCALATION

Since 1989, there has been a general sense that we are living through the end of an era of international relations. It is too early to say where we are headed, although there are certainly indications of an emerging world in which transnational markets and ethnic groupings matter more than the traditional politics of nation-states. It is not too early, however, to reflect on the age we are leaving behind. This essay looks back at the configuration of law and war as we have known them in the last century. Its point of departure is the recent decision by the International Court of Justice (the Court) on the legality of nuclear weapons.¹ The threat posed by these weapons is so enormous, and their role in international affairs has been so central, that any adequate consideration of their relationship to international law requires a return to first principles. When the Court examined these first principles, it found itself puzzled by the silence of the law at the point of greatest threat to mankind and the planet. To its dismay, the Court had to contemplate the possibility that nuclear destruction in defense of the state may be within the logic of international law. Understanding the relationship of nuclear weapons to international law has become all the more pressing in light of the recent nuclear weapons tests by India and Pakistan.

Over the last 150 years, we have witnessed a frenzy of law-making directed at regulating, mitigating, and preventing state violence. These efforts date from the mid-nineteenth century when the Civil War in this country and the Crimean War in

* Nicholas deB. Katzenbach Professor of Law, Yale Law School. I would like to thank Bruce Ackerman, Owen Fiss, and David Wippman for their helpful comments. Greg Bowman and Matthew Light provided valuable research assistance.

1. See Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, July 8, 1996, 35 I.L.M. 809 [hereinafter Nuclear Weapons Advisory Opinion].

Europe introduced the world to the possibility that democratic states are quite capable of waging war without limits. These conflicts began to suggest that instead of war being merely a Clausewitzian instrument of state policy, the state may be only an instrument of war.² They introduced the idea of total war—i.e., a conflict in which all of the capacities of the state are directed at the war effort.³ By the end of the century, war had become a common project of the state's industrial capacity and military organization, linked together by the vastly expanded administrative bureaucracy of centralized governments.⁴ To fight such a war required attacking far more than the military forces of the opposing state. The relevant target expanded to include the war-making capacities of the state, industrial and administrative. This military expansion required a corresponding expansion of the citizen's understanding of his relationship to the state. Minimally, he had so to identify with the state that the demands put upon him could be seen to be worth the sacrifice. The wars of nation-states correspond to the rise of a political ideology of nationalism.⁵

As state use of force burgeoned, there was a turn to law. In the United States, the Civil War introduced the first field manual of legal regulations on the conduct of hostilities: the Lieber Code.⁶ Legal specification of the acceptable manner of conducting war began alongside the endless slaughter of An-

2. Clausewitz's famous dictum was: "War is nothing but the continuation of policy with other means." CARL VON CLAUSEWITZ, *ON WAR* 69 (Michael Howard & Peter Paret trans. and eds., Princeton Univ. Press 1984) (1832).

3. The model for national mobilization goes back to the armies of the French Revolution. Revolutionary France introduced the use of mass conscription. See Peter Paret, *Conscription and the End of the Ancien Regime in France and Prussia*, in *UNDERSTANDING WAR* 53-74 (W.B. Gallie ed., 1991). The defeat of Napoleon's armies temporarily put off the need to recognize the new era of war and politics.

4. See generally ANTHONY GIDDENS, *THE NATION-STATE AND VIOLENCE* (1985).

5. See *id.* at 219 ("Nationalism is the cultural sensibility of sovereignty, the concomitant of the coordination of administrative power within the bounded nation-state.").

6. See Theodor Meron, *Frances Lieber's Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT'L L. 269 (1957). The Lieber Code became a primary source for the regulation of European armies and eventually formed the basis for the Hague Regulations adopted in 1899. See ADAM ROBERTS AND RICHARD GUELFF, *DOCUMENTS ON THE LAWS OF WAR* 7 (1982).

tietam, Gettysburg, and Fredericksburg. In Europe, a more technical turn was taken with the St. Petersburg Declaration of 1868, in which the instruments of war—including, for example, bullets that explode on contact—were legally regulated for the first time.⁷

The effectiveness, and even the rationality, of these two legal instruments as means of restricting state violence is certainly open to challenge. After all, Lieber's Code appeared in the same army that allowed William Sherman to declare a policy of total war as he cut a destructive swath through the South.⁸ And the exploding bullet was hardly at the heart of expanding military technology; the St. Petersburg Declaration did nothing about the development of the machine gun and the artillery shell.

Modern war has been characterized, on the one hand, by the extension of the magnitude of violence and the field of destruction to the entire civil order, and, on the other hand, by the appearance of legal codes that aim to limit the domain and character of hostilities. From the perspective of the formal law, modern warfare has been in a chronic state of illegality. The victors may retrospectively justify their actions under doctrines of double effect or proportionality, but the abridgment of the line between combatant and noncombatant—the central distinction upon which legal regulation relies—has been as characteristic of state-sponsored violence as of terrorism.⁹ Similarly, as happened with the St. Petersburg Declaration, the forces that lead to the production of ever more de-

7. See ROBERTS & GUELFF, *supra* note 6, at 30-31.

8. See William T. Sherman, *Memoirs* 119 (1875) ("War is cruelty and you cannot refine it").

9. In the Second World War, massive bombing raids against civilian targets were strategically employed in a largely unsuccessful attempt to undermine the popular will to fight. See LAWRENCE FREEDMAN & EPHRAIM KARSH, *THE GULF CONFLICT 1990-1991: DIPLOMACY AND WAR IN THE NEW WORLD ORDER* 314 (1993). The infamous My Lai incident, in which hundreds of unarmed Vietnamese civilians were killed by U.S. ground soldiers, is evidence of a non-strategic, but equally offensive, blurring of civilian and military targets. See Major Jeffrey F. Addicott and Major William A. Hudson, *The Twenty-fifth Anniversary of My Lai: A Time To Inculcate the Lessons*, 139 MIL. L. REV. 153, 156 (1993). The Gulf War saw the deployment of "smart bombs," which potentially embody the operational antithesis of the World War II bombing campaigns on civilian communities. Nevertheless, they were actually used in a new attempt to employ air warfare in a strategic manner:

structive weapons flow around any legal prohibition. The particular prohibition comes to look like an isolated point as technology moves on to other forms of destruction. Just as law would protect noncombatants, it would protect combatants from "unnecessary suffering." But did banning the exploding bullet make war more humane, even for an instant? No legal prohibition has given us a humane way to destroy the military, industrial, and political force of an enemy state. It is an unfathomable calculus that approves of the artillery shell, but not toxic gas.

There was an important difference between the approaches of these two early manifestations of the law of war. The Lieber Code was a set of rules of conduct for a people's army. As an exercise in self-regulation, it was an effort to imagine the appropriate boundaries of hostile conduct by a democratic army. The St. Petersburg Declaration was the product of a conference convened by the Czar. The fading aristocracy of Europe set its power to control conduct against technological development, attempting to specify the appropriate instru-

Inevitably, the strategic approach [employed in the Gulf War] meant attacking structures that were relevant to both civilian and military affairs. This would be true in any society; it was especially true in Iraq. In such a centralized, militarized state, civilian and military facilities could be interchangeable, and the systems of military command and political rule closely interwoven. This, in turn, led to the most controversial moments of the air campaign.

Id. at 319. See also FREEDMAN & KARSH, *supra*, at 330 tbl. 9 (summarizing the Allied air campaign as including 712 sorties against rail and road bridges; 601 sorties against communications targets; 215 sorties against electrical power targets; and 512 sorties against oil targets). Before the war ended, Baghdad had no electricity, no running water, no sale of gasoline, and its people were threatened with outbreaks of cholera and typhoid. See *id.* at 329. See also KENNETH L. VAUX, *ETHICS AND THE GULF WAR: RELIGION, RHETORIC, AND RIGHTEOUSNESS* 5 (1992).

It must be acknowledged that from the outset the Allies sought to limit civilian destruction and thus in part honored just war conventions. Pinpointing military targets with the awesome capacities of 'smart weapons' could restrict collateral damage. But by the end of the war, resolve to end it swiftly replaced reserve and resulted in the bombing of the Amilaya bomb shelter, killing 500 civilian women and children; probable damage to some hospitals (some of which Saddam had cruelly doubled as military sites); and divisions of hunkered down weaponless thousands, in the cool, impersonal rhetoric of war, eliminated by unresisted air assault.

Id.

ments of violence for armies that they did not yet fully identify as the state itself. Not until the Hague Conference of 1899 did the Europeans take up the regulatory task of the Lieber Code, at which point a specific code of conduct displaced generalized notions of chivalrous conduct in a class-organized society.¹⁰ Put another way, the democratic order of American life in the mid-nineteenth century required legal regulation of the conduct of armies because there was not a shared aristocratic culture defining the limits of appropriate military conduct. On the other hand, the restraints on behavior provided by a transnational aristocracy could do little to stop technological developments.

This difference in social orders set the different starting points of legal regulation. Yet, all modern states take up both directions of legal regulation—they must consider the manner of conduct of hostilities as well as the instruments of violence.¹¹ Nevertheless, the distinction still structures legal argument. We can ask whether nuclear weapons are illegal because of their effect on the conduct of hostilities—for example, destroying noncombatants as well as combatants¹²—or

10. See Hague Convention II with Respect to the Laws and Customs of War on Land, July 29, 1899, 1 Bevans 247.

11. The modern approach, marked by the 1977 Additional Protocols to the Geneva Conventions, has been to collapse the distinction and refer generally to international “humanitarian law.” The only enduring legacy of this difference in starting points is a certain confusion in this area of international law between what is referred to as the “law of the Hague”—which focuses on the manner in which hostilities are conducted and includes the general principle that “the right of belligerents to adopt means of injuring the enemy is not unlimited,” Convention Concerning the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, art. 22, U.S.T.S. 539, 205 C.T.S. 277—and the “law of Geneva”—which protects the victims of war. See Protocol Additional (No. I) to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 48, *reprinted in* 16 I.L.M. 1391 [hereinafter Protocol I].

12. See, e.g., Protocol I, *supra* note 11, art. 48, 16 I.L.M. at 1391 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).

because they violate a restriction on permissible instruments of force—for example, the prohibition on asphyxiating gases.¹³

The regulation of the conduct and instruments of war hardly exhausts the legal approach to war in this century. Beyond the humanitarian law that operates within violent conflict—*jus in bello*—is the law of the U.N. Charter (the Charter)—*jus ad bellum*. Here, law attempts to make an ultimate statement with respect to war. The Charter declares war illegal: states are prohibited from using force or the threat of force against one another.¹⁴ The Charter is the third effort in this century to place a legal prohibition on war itself. The Covenant of the League of Nations declared war and the threat of war “a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effective to safeguard the peace of nations.”¹⁵ Any vagueness in the League Covenant was overcome by the Kellogg-Briand Pact of 1928, under which states agreed not to have recourse to force in their international relations.¹⁶ In both cases, however, the prohibition was hedged with exceptions for vital state interests and was wholly without any legal enforcement power.¹⁷

13. See, e.g., Nuclear Weapons Advisory Opinion, *supra* note 1, para. 54, 35 I.L.M. at 823-24 (citing the prohibitions on “poisoned weapons” in the Second Hague Declaration of 29 July 1899, in Article 23(a) of the Regulations respecting the law and customs of war on land annexed to the Hague Convention IV of 18 October 1907, and in the Geneva Protocol of 17 June 1925).

14. See U.N. CHARTER art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.”).

15. LEAGUE OF NATIONS COVENANT art. 11, para. 1.

16. See Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, art. I, 46 Stat. 2343, 2345-46, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact] (“The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relationship with one another.”).

17. On vital interests and the Kellogg-Briand Pact, see Paul W. Kahn, *From Nuremberg to the Hague: The United States Position in Nicaragua v. United States and the Development of International Law*, 12 YALE J. INT’L. L. 1, 9-12 (1987) [hereinafter Kahn, *From Nuremberg to the Hague*]. The great sign of the League’s collapse was its failure to respond to the Italian incursion in Ethiopia. See John H. Spencer, *The Italian-Ethiopian Disputes and the League of Nations*, 31 AM. J. INT’L. L. 614 (1937).

The Charter declared every international war to be a matter of universal concern. Every use of force or threat of force for national political ends would be viewed as an offense to the world community, which would possess the legal authority, moral responsibility, and military capacity to respond.¹⁸ The very language of war was to disappear in the Charter era. Use of military force as an affirmative instrument of state policy is not war but an illegal "act of aggression."¹⁹ A legal use of force is either "self defense" or a Security Council "operation."²⁰ Use of force is permitted only when limited to the enforcement of law—rather like the policeman using force in response to illegality under domestic law. This was the aspiration and ideal of law, which remained oddly untouched by the proliferation of wars, both cold and hot, throughout the first fifty years of the Charter's existence.

Although the Charter was drafted shortly before the deployment and use of nuclear weapons, the world these weapons sustain was the world at which the Charter was directed. Nuclear weapons make permanent, as a material fact of our lives, the threat of total war. If war is nuclear, then regulation inevitably aims at prohibition. We cannot regulate at the limits; we can only prohibit. Those who believe that nuclear weapons can be used for limited military objectives have always appeared as outside of the political consensus. Legal regulation of nuclear weapons has never been understood as specifying the legitimate boundaries of nuclear war, but rather as steps taken to prevent such a war and, ultimately, to eliminate such weapons. The Strategic Arms Limitation Treaty (SALT I) was to be followed by SALT II and as many further reiterations as necessary to reach that end.

If nuclear weapons could take war to a limit condition, the Charter would take law to a similar limit condition. Thus, the post-War era was a period of extremes of both law and war.

18. Legal authority is specified in U.N. CHARTER art. 24, para. 1 (confering "primary responsibility" on the Security Council for the maintenance of international peace and security); moral responsibility is described in the Charter's preamble ("determined to save succeeding generations from the scourge of war"); and military capacity is provided under U.N. CHARTER art. 43 (members are "to make available to the Security Council . . . armed forces").

19. See U.N. CHARTER art. 1, para. 1 & art. 39.

20. See *id.* arts. 51 & 42.

That very extremism linked war and law together: total war versus total law. This contrast of law and war may, however, be less extreme than it first seems.

The Charter's primary end was to eliminate war, but it sought to do so by stabilizing a politics of sovereign states. Its prohibition on war rests on the legal recognition of the normative claim of the sovereign nation-state. At the center of the Charter system is the idea that every political entity is to be a state,²¹ that every state has a legal right to continue to exist indefinitely,²² and that all states are protected by law from transgression of their borders and interference in their domestic affairs.²³ The Charter did not attempt to move beyond war by decentering the state from international law. Rather, it sought to accomplish, through law, war's end of securing the vital national interest in the state's own continued existence as an autonomous political association.²⁴

The modern effort to make war unnecessary, however, has been less than a success. Law did not fill the place of war. Just as before the Charter, war again slipped the bounds of law, going around law or simply ignoring it.²⁵ Against the threat of

21. Chapter XII of the Charter, establishing an International Trusteeship System, has been largely a dead letter. See U.N. CHARTER arts. 75-85. Trusteeships imagined in 1945 were quickly displaced by the decolonization movement, with its ideal of popular sovereignty and a norm of statehood. On statehood and self-determination under the mandate system of the League, see John Quigley, *Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood*, 7 B.U. INT'L. L.J. 1, 3-6 (1989).

22. This is the meaning of the "inherent right of . . . self-defence" set forth in Article 51, as well as an aspect of "the principle of sovereign equality," listed among the Principles of Article 2. See U.N. CHARTER art. 51 & art. 2, para. 1.

23. On the principle of noninterference, see U.N. CHARTER art. 2, para. 7.

24. Efforts to read a primacy of human rights into the Charter are all anachronistic. See Rosalyn Higgins, *Postmodern Tribalism and the Right to Secession: Comments*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 29 (C. Brolmann et al. eds., 1993) (stating that "it is revisionism" to see the Charter norm of self-determination as referring to anything more than a right of "one state to be protected from interference by other states or governments").

25. See Thomas M. Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 812 (1970) [hereinafter Franck, *Who Killed Article 2(4)?*]:

The great wars of the past, up to the time of the San Francisco Conference, were generally initiated by organized incursions of large military formations of one state into the territory of another,

nuclear war, law did not make us more secure. Nuclear deterrence, not law, kept the rough peace between the Cold War opponents. Indeed, this threat provided the military condition in which local wars could proliferate.²⁶ Those local wars continued to power the search for yet more legal regulation.²⁷ Ironically, nuclear deterrence created the space within which law could operate. The parallel phenomena of more law and more war continued in the Charter era.²⁸

incursions usually preceded by mobilization and massing of troops and underscored by formal declarations of war. Because it was so familiar to them, it was to aggression of this kind that the drafters of Article 51 addressed themselves. Modern warfare, however, has inconveniently by-passed these Queensberry-like practices. It tends, instead, to proceed along two radically different lines, one too small and the other too large to be encompassed effectively by Article 51. These two categories are, first, wars of agitation, infiltration, and subversion carried on by proxy through national liberation movements; and, second, nuclear wars involving instantaneous use, in a first strike, of weapons of near paralyzing destructiveness.

Id.

26. See LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 889 (3d ed. 1993) (citing LOUIS HENKIN, *HOW NATIONS BEHAVE* 112-118 (2d ed. 1979):

The Cold War may have encouraged violations [of the Charter's prohibition of the use of force] by smaller developing powers who expected that ideological conflict between the super powers would incapacitate the Security Council and provide them immunity from other adverse consequences (e.g., the Iran-Iraq War 1981-88 and wars between Ethiopia and its neighbors).

Id.

27. The proliferation of local wars has been invoked as justification, in part, for the expansion of the regulation of warfare to internal conflict. See *INTERNATIONAL COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS* 41 (Sandoz et al. eds., 1987); Paul Kahn, *Lessons for International Law from the Gulf War*, 45 *STAN. L. REV.* 425, 437 n.39 (1993) [hereinafter Kahn, *Lessons for International Law*]; ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES* 201 (1995) ("The principle of self-determination was a major factor leading to the creation of a new category of armed conflict covered by the rules of international warfare: wars of national liberation."). Protocol II accomplished this expansion of the regulation of warfare. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 16 *I.L.M.* 1442 [hereinafter Protocol II].

28. See, e.g., Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons, G.A. Res. 1653, 16th Sess., U.N. Doc. A/Res/16/1653 (1961); Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, Aug. 5, 1963, 14 *U.S.T.* 1313, T.I.A.S. No.

The legal prohibition on force has not been much of a practical restraint. Since the Charter's declaration of illegality, war and the preparation for war have continued to characterize international relations.²⁹ Even without a major conflagration in the last 50 years, over twenty million people have died in well over 100 wars.³⁰ The recent collapse of the Soviet Union may have lessened the largest threat to the world order, but it has also shifted the locus of war and the threat of war. There has been an outbreak of local wars, made possible by the superpowers giving up the policing function in their "spheres of influence." Instead of proxy wars at the fringes of spheres of influence, we now have ethnic wars in previously pacified areas. The Charter's vision of legal protection of existing states within defined geographical boundaries left no room for the rise of new states. In the 1960s, the Charter system had to confront the problem of decolonization; today, it confronts the problem of secession. Law cannot simply declare an end to state-making aspirations. Its very protection of the status quo invites violence from those who seek a reconstruction of state borders to match national aspirations.

5433; Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, May 18, 1972, 23 U.S.T. 701, T.I.A.S. 7337; Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839; Protocol I, *supra* note 11; Protocol II, *supra* note 27; Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062; Declaration on the Prohibition of Chemical Weapons, Jan. 11, 1989, 28 I.L.M. 1020; Comprehensive Nuclear-Test-Ban Treaty, G.A. Res. 46/29, 46th Sess, U.N. Doc A/Res/46/29 (1991); Treaty on Conventional Armed Forces in Europe, Nov. 19, 1990, 30 I.L.M. 1 (1991); Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800. For a compilation of the above-cited sources, see LOUIS HENKIN ET AL., BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW: CASES AND MATERIALS (3d ed. 1993).

29. Since 1952, U.S. defense outlays have remained between 212.5 billion and 342.2 billion 1991 dollars. See U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, AFTER THE COLD WAR: LIVING WITH LOWER DEFENSE SPENDING, appendix A, table 1 (1992). For continued investment in the United States's nuclear forces in the post Cold-War era, see Brian Hall, *Overkill is Not Dead*, N.Y. TIMES MAGAZINE, March 15, 1998, at 42.

30. See RUTH LEGER SIVARD, WORLD MILITARY AND SOCIAL EXPENDITURES 20 (1993) (counting 149 wars and 23 million deaths since 1945).

At the end of this very long century, the rule of law confronts the use of force in the easy and repeated invocation of the "new world order," which is supposed to have begun in 1989, and had its most vivid moment of success in the deployment of forces against Iraq's seizure of Kuwait.³¹ If the old order was one in which violence always threatened, and repeatedly overwhelmed law, the new order is to be one in which relations among states are governed by law. Two largely unnoticed events symbolize what is to be a new, more successful relationship of law to violence. First, the General Assembly declared the last decade of the century the "decade of international law."³² Second, the International Court of Justice responded to a request from the General Assembly for an advisory opinion on whether the use or threat to use nuclear weapons violates international law.³³ If this long century began with the discovery of the capacity of ordinary citizens for unlimited warfare in places like Gettysburg and Sevastopol, then it ends with a book-length set of opinions from the International Court of Justice at the Hague declaring nuclear weapons "generally"—but perhaps not always—illegal. Law confronts nuclear Armageddon and declares the outcome to be a draw.

If this century needs to be viewed through the intertwined relationship of law and war, then these opinions offer a unique opportunity to reflect on this relationship. To answer the question before the Court, the judges must come to grips with both of the legacies of this century: the totalizing claims of war and of law.³⁴ An examination of the judicial opinions quickly takes us to the hardest question in international law today: what is the place of the nation-state in that legal order? The difficulties that the Court had in resolving the case reflect

31. See *Lessons for International Law*, *supra* note 27, at 432-33.

32. See G.A. Res. 23, 44th Sess., U.N. Doc. A/Res/44/23 (1989). See also KEY RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY 1946-96, at 99-102 (Dietrich Rauschning et al. eds., 1997) (listing resolutions concerning the "development and strengthening of international law").

33. See G.A. Res. 75, 49th Sess., U.N. Doc. A/Res/49/75 (1994) (requesting an Advisory Opinion).

34. One succinct way of putting the question is to ask whether the international order owed its survival to the policy of nuclear deterrence or to international law? Would a declaration that the threat of nuclear war is illegal amount to the legal condemnation of the very structure of order that has saved us from Armageddon?

deeper puzzles about the place of the state as both the source of law and an object of legal regulation.

Law and war are not abstractions, but ways in which states express themselves to each other and to their own citizens. It is a commonplace, but it nevertheless may be true, that the age of the sovereign nation-state is passing—replaced by practices, laws, and institutions that express a conception of community and the individual different from that which has been at the core of the modern world order.³⁵ The international law of war and peace may reflect less of this post-sovereign order than do other bodies of international law. It is still the law formed by, and in response to, potentially warring nation-states. Perhaps that is as it should be, since those states continue to control the instrumentalities of state violence and still make the ultimate decisions about whether or not to go to war. The armies of the world largely remain national forces controlled by state decision-makers or those who would be state decision-makers. These national armies, however, may find themselves with increasingly less to do as the world changes around them. Certainly, they will find themselves doing different things. In this sense, the practices of war and law that I discuss in this article may already be fading into the past. It is, however, our past, and we need to understand it.

II. THE DECISION TO DECIDE

Even viewed in the abstract, the case on the legality of the threat or use of nuclear weapons represents a thought-provoking, if not amazing, moment in the history of international

35. See JEAN-MARIE GUÉHENNO, *THE END OF THE NATION-STATE* 17 (Victoria Elliot trans., 1995):

The spatial solidarity of territorial communities is disappearing, to be replaced by temporary interest groups. Now, the nation-state, in its pretension to combine in a unique framework the political, cultural, economic, and military dimensions of power, is prisoner to a spatial conception of power, even as it tries to redistribute its competences according to a federal principle. Space has ceased to be the pertinent criterion. Will politics survive a similar revolution? From the beginning, since the Greek city (polis), politics has been the art of governing a collectivity of people defined by their rootedness in a location, city, or nation. If solidarity can no longer be locked into geography, if there is no longer a city, if there is no longer a nation, can there still be politics?

Id.

law. The International Court of Justice was asked by the General Assembly to decide upon the legality of those instruments of violence that have been most responsible for shaping the course and character of international relations for the last two generations.³⁶ The hope of many states was that the Court would declare a fundamental element of the international order illegal. The equivalent move in domestic law would be a challenge to the constitutionality of property as a violation of the equality norm of the Constitution. Could we wake up one day to find that the order that we have taken for granted has been declared illegal? Illegal not because of any new act of law-making, but illegal all along without our knowing it.³⁷

Yet, if the task demanded of the Court seems startlingly large, the failure to engage it seems equally dramatic. How could the Court declare nuclear war a legal option, when the very purpose of international law so often has seemed to be that of affirming peace over war, life over death? Can law legitimate nuclear annihilation? Neither, however, would it be easy for the Court simply to remain silent. Imagine a statement from the Court that law has nothing to say about nuclear weapons. Would that be an admission that law is silent about the very existence of history, indifferent to whether or not the world continues as an order of life rather than death?

In these opinions, then, we have an important moment in the century-long confrontation between law and war. For some, it was to be a moment of transition from the old order

36. Judge Nagendra Singh described this question as the most important aspect of international law facing humanity today. NAGENDRA SINGH, *NUCLEAR WEAPONS AND INTERNATIONAL LAW* 17 (1959). Dissenting Judge Weeramantry described the case as raising the "most important of legal issues ever to face the global community." *Nuclear Weapons Advisory Opinion*, *supra* note 1, para. 10, 35 I.L.M. at 886 (dissenting opinion of Judge Weeramantry).

37. Of course, there have been moments when domestic courts have reached extraordinary decisions profoundly reordering the political domain—for example, declaring an end to segregation or requiring one person, one vote. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954); *Reynolds v. Sims*, 377 U.S. 533 (1964). Even if these are the appropriate analogies, it would still be extraordinary to ask the International Court to take a similarly dramatic step. In fact, the request to the Court is even more extreme because nuclear weapons policy is about self-defense, and no issue is of more direct importance to the state than the conditions of its own survival.

of war to the new order of law. Judge Oda, in dissent, gives us an indication of the tactical, political character of the case:

In the development of nuclear disarmament in the forum of the United Nations, the movement aiming at the conclusion of a treaty to totally prohibit the 'use or threat of use of nuclear weapons' was at a standstill for more than 10 years . . . Against the background of that situation a group of states stimulated by a few NGOs attempted to achieve a breakthrough by obtaining the Court's endorsement of an alleged legal axiom in order to move towards a worldwide anti-nuclear weapons convention. I have no doubt that the request was prepared and drafted . . . with highly *political* motives.³⁸

The majority does not disagree with Oda's account of the political motives that led to the request for an advisory opinion. Rather, it rejects the relevance of that political history to its law-declaring function: "[O]nce the Assembly has asked . . . for an advisory opinion on a legal situation, the Court . . . will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution."³⁹ While Judge Oda thinks the case political and tactical at its core—and therefore dissents from hearing it at all—the majority adheres to the view that international law is distinguishable from the politics of nations and that clarification of law may help to resolve political disputes: "'[I]n situations in which political considerations are prominent, it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate.'"⁴⁰

38. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 44, 35 I.L.M. at 859 (dissenting opinion of Judge Oda) (emphasis added).

39. *Id.* para. 16, 35 I.L.M. at 819. The actual distribution of votes in the General Assembly was 78 for, 43 against, 38 abstaining, and one, China, absent from voting. Apart from China, all of the nuclear weapons states voted against.

40. *Id.* para. 13, 35 I.L.M. at 818 (quoting Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 I.C.J. 87 (Dec. 20)). Even in contentious cases, the Court has pursued adjudication on the ground that clarification of the legal merits may contribute to the political resolution of a dispute. See *The Diplomatic and Consular*

Affirming this distinction between law and politics is an important aspect of the Court's long-term project of establishing and maintaining a comprehensive legal order at the international level. In every situation, the Court must be able to say what the law is, even if the law is only that a state has discretion to decide the particular issue. As the institution most responsible for furthering the integrity of international law, the Court is committed to the proposition that, like any other legal system, international law is complete. This means "that every international situation is capable of being determined *as a matter of law*."⁴¹ Logically, this means only that international law creates presumptions and burdens of proof that assign responsibilities among the states contesting the legality of a course of behavior. In the *S.S. Lotus* case, the Court set the background or default condition for a complete legal order: a state arguing for an international legal rule restricting the behavior of another state has the burden of establishing the rule. If it fails to meet that burden, international law protects the opposing state's right to act as it deems appropriate.⁴² Correspondingly,

Staff in Tehran case (U.S. v. Iran), 1980 I.C.J. 3 (May 24); Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392 (Jurisdiction and Admissibility, Nov. 26) [hereinafter Nicaragua Case—Jurisdiction].

41. 1 OPPENHEIM'S INTERNATIONAL LAW 13 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992). See also Nuclear Weapons Advisory Opinion, *supra* note 1, para. 36, 35 I.L.M. at 937 (dissenting opinion of Judge Higgins) ("It is . . . an important and well-established principle that the concept of *non liquet* . . . is no part of the Court's jurisprudence.").

42. See *Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). The separate opinion of Judge Guillaume makes the strongest appeal to the *Lotus* principle: "[I]f the law is silent in this case, States remain free to act as they intend." Nuclear Weapons Advisory Opinion, *supra* note 1, para. 9, 35 I.L.M. at 1353 (individual opinion of Judge Guillaume). Judge Shahabuddeen in dissent provides the most detailed response to this point, arguing that the presumption of the *Lotus* case does not apply when a state's actions threaten to "end[] civilization and annihilat[e] mankind." *Id.* 35 I.L.M. at 867 (dissenting opinion of Judge Shahabuddeen). See also Judge Weeramantry, dissenting:

It is implicit in "*Lotus*" that the sovereignty of other States should be respected. One of the characteristics of nuclear weapons is that they violate the sovereignty of other countries who have in no way consented to the intrusion upon their fundamental sovereign rights, which is implicit in the use of the nuclear weapon. It would be an interpretation totally out of context that the "*Lotus*" decision formulated a theory, equally applicable in peace and war, to the effect that a State could do whatever it pleased so long as it had not

in *Nicaragua v. United States*, the Court set forth the burden of proof requirement with respect to the factual predicates of legal claims: again, the burden of proof is on the party contesting the legality of a state's behavior.⁴³

Nevertheless, a complete legal system does not necessarily require judicial jurisdiction over every legal question. To hold that there is an answer under international law to every question is not the same as holding that it is always the Court's role to say what that answer is. The majority reasons that if there is law—which there must be, given the *Lotus* principle—how can the Court not respond when a body authorized to make a request asks it to say what the law is?⁴⁴ The Court takes this position even though its statute allows discretion in response to such a request: "The Court *may* give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."⁴⁵ The Court can decide that a body is not "authorized" to make the request. Indeed, it reached just this conclusion in the parallel case challenging nuclear weapons brought by the World Health Organization.⁴⁶ But if there is authorization, the Court has always answered the question: "There has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinions in the history of the present Court."⁴⁷ The Court seems to confuse—or at least collapse—extension of the reach of international law with the extension of its own voice. It suggests that an international order perfectly regulated by law

bound itself to the contrary. Such an interpretation of "Lotus" would cast a baneful spell on the progressive development of international law.

Id. at 903-04 (dissenting opinion of Judge Weeramantry).

43. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 135, para. 269 (Merits, June 27) [hereinafter *Nicaragua Case—Merits*].

44. Judge Oda was the only dissenter from the Court's decision to hear the case. See *Nuclear Weapons Advisory Opinion*, *supra* note 1, 35 I.L.M. at 843 (dissenting opinion of Judge Oda).

45. I.C.J. STATUTE art. 65, para. 1 (emphasis added).

46. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, July 8, 1996, para. 26, 35 I.L.M. 809 (visited Mar. 26, 1998) <<http://www.law.cornell.edu/icj/icj2/anw-003f.htm>>.

47. *Nuclear Weapons Advisory Opinion*, *supra* note 1, para. 14, 35 I.L.M. at 818.

would be one without jurisdictional barriers to adjudicative resolution of all potential disputes.

Curiously, even though judicial prudence is a political virtue, there seems to be more room for its exercise in contentious cases than in the advisory role of the Court.⁴⁸ The Court seems to get things backwards. Parties to a dispute may have a legal right to obtain an adjudicative resolution from the Court, but advisory opinions should be assessed in terms of the possibility of an actual contribution to an international problem or dispute.⁴⁹ A statement of the presence or absence of legal rights may not always be a useful interjection in a dispute that can only be resolved through political negotiation and compromise. If rights are “trumps,” turning political discourse into a discourse of rights may have costs to the project of maintaining international peace and security. In the context of this case, a belief that law will be of assistance in the resolution of the political dispute seems naive. It is not likely that the nuclear powers are going to be more responsive to a legal proposition regarding nuclear weapons than to the human and environmental dangers of these weapons.

While giving up a prudential use of jurisdiction, the Court’s substantive discussion of law nevertheless has its own tactical quality. The Court attempts to yoke the political process to the legal problem and thus avoid the dilemma of either ineffectually declaring nuclear weapons illegal or declaring law’s indifference to nuclear destruction. In a kind of addendum to the opinion, the Court suggests that disagreement on the legality of nuclear weapons is an intolerable burden for international law and that “[i]t is consequently important to

48. See SHABTAI ROSENNE, 2 *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996*, at 546-52 (1997). Perhaps a discretionary rule with respect to advisory opinions is just “too political” for courts. The U.S. Supreme Court very early declined to give any advisory opinions. See Letter of Chief Justice Marshall to President Washington, *quoted in* PAUL BATOR ET AL., HART AND WECHSLER’S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 65-66 (2d ed. 1973). Answering either all such requests or none at all may be the only non-political options. With respect to the political virtues of judicial prudence, see generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1973).

49. See Prosper Weil, “*The Court Cannot Conclude Definitively. . .*”: *Non Liquet Revisited*, 31 COLUM. J. TRANSNAT’L L. 109 (1997) (arguing that *non liquet* is not available in contentious proceedings, but is available in advisory proceedings).

put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result."⁵⁰

Instead of the Court leading the way to the new world order, as those who sought an advisory opinion had hoped, the majority declares itself to be following the political process. The Court cannot really believe that its admonition to negotiate a political resolution will have any practical effect. The Court as an institution does not have a great deal of moral prestige that can add weight to its plea. If the nuclear powers have not negotiated a total prohibition on these weapons in light of their practical dangers, it is unlikely they will make a greater effort to do so in order to clarify or stabilize the law. But by shifting the point of entry of law into politics, the Court is enabled to make a normative claim without declaring any present practice a violation of law. "Complete nuclear disarmament" is affirmed as the normative goal by which to evaluate state practice, but it is not clear whether it is a legal or a political norm. The current state of affairs is a political condition that is legally deficient but not illegal.

III. THE FAILURE TO ANSWER

The most notable thing about the opinion of the Court is that it comes close to, but does not quite answer, the question put to it by the General Assembly. Instead of ruling on whether the threat or use of nuclear weapons is legally permissible, the Court holds that while "the threat or use . . . would generally be contrary to the rules of international law . . . the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense."⁵¹ Since the nuclear-weapons states assert that they would use these weapons only in such "extreme" circumstances, the Court fails to rule on the real

50. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 98, 35 I.L.M. at 830.

51. *Id.* para. 105, 35 I.L.M. at 831. Vice-President Schwebel, in dissent, calls this conclusion "astounding:" "[T]he Court concludes on the supreme issue of the threat or use of force of our age that it has no opinion." *Id.* at 840 (dissenting opinion of Judge Schwebel).

issue of controversy.⁵² This failure is not the product of a lack of nerve or inadequate analysis. Rather, the legal resources that bear on the problem are in perfect equipoise. To resolve the issue, the Court would have to find a ground of normative priority between two distinct approaches to international law. Neither approach, however, is more important, basic or essential than the other.

A. *Legitimacy, Justification, and the Foundation of International Law*

One approach understands international law as the product of consensual actions by states. On this view, the legitimate authority of international law arise out of the consent of the states that bear the legal obligation. Accordingly, to understand the content of the law, we need to trace the character and implications of state consent. I will generally call this the perspective of "legitimacy," because its primary concern is with the source of the claim of legal obligation, rather than with the justice of those obligations. Interpretation of law, on this view, must link the content of law to its origin in state consent. Legal claims that extend beyond that consent are illegitimate. This is not to suggest that consent must be interpreted narrowly; it is only to identify the conceptual parameters of the interpretive debate within this approach to legal obligation.⁵³

The other approach locates the normative claim of international law in the expression of principles of moral behavior among states.⁵⁴ To understand the demands that law makes upon the state, we interpret these principles in light of an understanding of justice among states. On this view, we must dis-

52. Judge Shahabuddeen in dissent notes that the Court's exception covers the "position taken by the nuclear weapons states," with the result that "the General Assembly has not received an answer to the substance of its question." *Id.* at 861-62 (dissenting opinion of Judge Shahabuddeen).

53. This approach could be described as a kind of "soft positivism." *See* Jules Coleman, *Negative and Positive Positivism*, XI JOUR. OF LEGAL STUDIES 139 (1982). However, I am concerned with arguments for consent as a normative principle, rather than with social practices of consent.

54. In part, international law provides "rules of the road" that have no independent moral basis but serve a coordinating function. *See* H.L.A. HART, *THE CONCEPT OF LAW* 223 (1994). The moral claim of such rules is a function of their being adopted, i.e., it is not independent of their status as law.

tinguish the origin of law from the content of law. While much of international law may emerge from the consensual actions of states, the content of that law is not bound by those consensual acts. When we argue about the content of the law, we look to the justifications for legal norms, which means that we look to the moral principles that inform the specific, positive provisions of law. Judge Ranjeva expresses this perspective when he writes: "The moral requirements are not direct and positive sources of prescriptions or obligations but they do represent a framework for the scrutiny and questioning of the techniques and rules of conventional and consensual engineering."⁵⁵ I will call this the perspective of "justification."⁵⁶

These double perspectives of legitimacy and justification are not different in kind from the perspectives brought to domestic law issues. There too, we can look to the behavior and intentions of those who may legitimately create a legal obligation, or we can look to the moral principles that justify the positive law.⁵⁷ We may hope that there is a coincidence of legitimacy and justice, such that consent is given to just principles. This is, for example, one way to summarize Rawls's ambition in creating the idea of an original position behind the "veil of ignorance."⁵⁸ Nevertheless, interpretive disagreements frequently are a function of prioritizing one perspective over the other.

The substantive disagreement on the appropriate direction of interpretation reflects institutional differences that

55. Nuclear Weapons Advisory Opinion, *supra* note 1, 35 I.L.M. at 1355 (separate opinion of Judge Ranjeva).

56. Here, one could appeal to natural law traditions of jurisprudence to specify the character of the argument. Yet, as with positivism, the formal category of natural law fails to capture the conflict I am interested in. See *supra* note 53. We need not enter a debate about the origins of these moral principles, or their universality, in order to understand the difference in perspectives between legitimacy and justification.

57. For a paradigmatic jurisprudence of legitimacy, see, for example, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); for a paradigmatic jurisprudence of justification, see, for example, RONALD DWORKIN, *LAW'S EMPIRE* (1986). In international law Thomas M. Franck's two recent books cover this division; see *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) [hereinafter FRANCK, *LEGITIMACY*] and *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995) [hereinafter FRANCK, *FAIRNESS*].

58. See JOHN RAWLS, *A THEORY OF JUSTICE* 12 (1971).

characterize the participants in contemporary international law. The primary method of advancement of a post sovereign-state international law agenda has been through the work of legal scholars and non-governmental organizations (NGOs).⁵⁹ Their work, however, does not proceed independently of the development of new conventional law arrangements—especially multilateral conventions. The treaty negotiated by state representatives and then ratified by the domestic political institutions has become the primary source of entry for new international law. Scholars and NGOs work in and around this developing conventional law, although they make their contributions at different moments in the process of law creation. The NGOs are there at the moment of negotiation and drafting, pressing a post-sovereignty view of what the law should be. These institutions, for the most part, represent substantive interests quite independent of the state: e.g., the environment, human rights, women's equality, minority rights. Their interest is to push the formal participants in the development of law—still nation-states—in directions justified independently of any particular state's interests.⁶⁰

The scholars, on the other hand, often approach the conventional legal product after the fact of its creation. Sharing the post sovereign-state perspective, however, their interest is in offering interpretations of conventional law that support transnational ends. Because they have a normative affinity with the NGOs, they tend to read the law as if it successfully established that which the NGOs sought to accomplish. Their statements of "what the law is" can be quite powerful. As with domestic, common-law courts, the law-declaring function is central to the development of law. Only after there has been a pronouncement of what the law is does a court—or any other legal decisionmaker—have a way of viewing and understanding an otherwise disorganized practice. In international law,

59. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L. L. 183, 184-86 (1997). See generally Ethan Nadelman, *Global Prohibition Regimes: The Evaluation of Norms in International Society*, 44 INT'L. ORG. 479 (1990).

60. For a description of this process in the context of the 1992 U.N. Conference on Environment and Development (UNCED) held in Rio de Janeiro, see Lee Breckenridge, *Protection of Biological and Cultural Diversity: Emerging Recognition of Local Community Rights in Ecosystems Under International Environmental Law*, 59 TENN. L. REV. 735, 735-37 (1992).

judicial pronouncements of law are so rare that scholars' statements of the law work in a relatively open field. The international legal scholar takes on the burden of moving from the particular to the general. He or she announces that a principle has been accepted in a convention or has passed from convention to custom, i.e., from discrete political practices to a general rule of law. By announcing a rule of law, the scholar fills the logical void raised by the traditional conundrum of the origins of customary law, i.e., how can a practice become law, if a necessary condition of law is that the practice be pursued with an understanding—*opinio juris*—that it is already law. This has been the practice of modern international-law scholarship with respect to human rights, environmental law, the law of development and now a right to representative government.⁶¹

Conventional international law products increasingly involve this tension between production by states and interpretation by non-state participants in international legal arguments. The state participants may intend to preserve the priority of sovereignty in their creation of conventional law, but they may lose control over the product of their law-making efforts. There is always a scholar or an organization willing to push the argument that the law has already moved to a position in which it has incorporated a preferred value as a customary law rule.⁶²

61. Two decades ago scholarship focused, for example, on a right of humanitarian intervention. See HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed., 1973). Today, the focus has moved from unilateral intervention to internal forms of governance. See, e.g., Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992) [hereinafter Franck, *Democratic Governance*]:

The purpose of this essay is to demonstrate that the radical vision, while not yet fully word made law, is rapidly becoming, in our time, a normative rule of the international system Increasingly, governments recognize that their legitimacy depends on meeting a normative expectation of the community of states. This recognition has led to the emergence of a community expectation: that those who seek the validation of their empowerment patently govern with the consent of the governed. Democracy, thus, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.

Id.

62. For example, the International Law Commission included severe damage to the environment in its Draft Articles on the Draft Code of Crimes

Even the state that refuses to join a multilateral convention may find itself in a situation in which others are arguing that it is bound by a customary law rule "crystallized" in the process of creating the convention.⁶³ Conventional law victories are rendered more secure by arguments for customary law; conventional law defeats are fought again in the arguments made for customary law. For this reason, the discipline of international law contains little that is settled even in its fundamental norms. While some are arguing that particular values have already passed up the normative hierarchy from convention to custom to *jus cogens*, others are arguing that there should be no such hierarchy.⁶⁴ Not surprisingly, these disputes arise most readily with respect to the law of human rights, group rights, and the environment—and, of course, with respect to nuclear weapons themselves.

The Court finds itself drawn to both interpretive perspectives, that of legitimacy and of justification. Because it is com-

Against the Peace and Security of Mankind, *reported in* United Nations, International Law Commission Report on the Draft Articles Adopted at its Forty-Third Session, 30 I.L.M. 1584, 1593 (1991). Environmental damage was listed alongside genocide, aggression, and violations of human rights. Naomi Roht-Arriaza has criticized Harald Hohmann's liberal use of non-treaty sources to construct a premature "precautionary principle" of environmental law. Naomi Roht-Arriaza, *Book Review*, 21 COLUM. J. ENVTL. L. 183, 196-97 (1996) (reviewing HARALD HOHMANN, *PRECAUTIONARY LEGAL DUTIES AND PRINCIPLES OF MODERN INTERNATIONAL ENVIRONMENTAL LAW* (1994) and *BASIC DOCUMENTS OF INTERNATIONAL ENVIRONMENTAL LAW* (Harald Hohmann ed., 1994)). *See also* Eugene Fidell, *Maritime Transportation of Plutonium and Spent Nuclear Fuel*, 31 INT'L L. 757, 772 (1997) (criticizing Jon M. Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials*, 27 OCEAN & INT'L L. 376 (1996) for confusing advocacy with "a disinterested appraisal of the current state of international law").

63. *See* North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 42-44 (Feb. 20) (dissenting opinion of Judge Sorensen) ("The convention may serve as an authoritative guide for the practice of States faced with the relevant new legal problems, and its provisions thus become the nucleus around which a new set of generally recognized legal rules may crystallize."). *See also* Mergé Case, It.-U.S. Conciliation Commission, 14 U.N. REP. INT'L ARB. AWARDS 236, 243 (1955) ("The Hague Convention [on Certain Questions Relating to the Conflict of Nationality Laws of 1930], although not ratified by all the Nations, expresses a *communis opinio juris* by reason of the near unanimity with which the principles referring to dual nationality were accepted.").

64. *See* Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 423-30 (1983).

posed, for the most part, of legal scholars, it is inclined to take the traditional perspective of scholarship. It too understands progress in international law as the emergence of a *legal* perspective that is different from that of the sovereign state. It thinks in terms of an international community of interests that is more than the aggregation of the particular political interests of states. It tends to interpret the law in light of the principle of state equality, regardless of the actual differences in state power that operate in the creation of the rule.⁶⁵ It has been steadfast in its view that law is to displace force in international relations, and that force represents a self-interested, state perspective opposed to the transnational perspective of international law.⁶⁶ It assumes that states are inclined to interpret their international legal commitments in a way that matches their current self-interests; it attempts to balance that self-interest with a transnational perspective.⁶⁷

The Court's interest in furthering legal interpretations that support these values is linked to its conception of itself as an international institution independent of the states that are responsible for its own origin and the selection of new judges.⁶⁸ Nevertheless, the Court as a political institution in a world of sovereign states cannot get too far ahead of a state's understanding of its own consent. Were it to do so, it would render itself politically irrelevant. The history of adjudication before the Court is filled with instances in which states simply refused to appear.⁶⁹ If states decline to listen, the Court faces

65. See, e.g., *Nicaragua Case—Merits*, *supra* note 43, at 99-123, paras. 187-238 (interpreting collective self-defense in a way that denies U.S. authority to intervene in the absence of an explicit request).

66. See *Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 ICJ 3, 43, para. 93 (May 24) (condemning the attempted rescue mission by the U.S. military during the pendency of judicial action as "an operation . . . of a kind calculated to undermine respect for the judicial process in international relations").

67. See *Corfu Channel (U.K. v. Alb.)*, 1949 ICJ 4, 35 (Apr. 9) ("[T]he alleged right of intervention . . . cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible . . . for, from the nature of things, it would be reserved for the most powerful States.").

68. Membership is broadly representational. See I.C.J. STATUTE art. 3, para.1 and art. 9. All members must gain the approval of both the General Assembly and the Security Council. See *id.* art. 4, para. 1 and art. 10.

69. See, e.g., *Nicaragua Case—Merits*, *supra* note 43; *Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24); *Aegean Sea Conti-*

the danger of making its own voice the equivalent of another scholarly voice. Indeed, scholars may become its primary audience. The threat of irrelevance is particularly prominent in the nuclear weapons case, in which none of the nuclear weapons states supported the General Assembly's decision to request an advisory opinion.

B. *State Sovereignty and Transnational Norms*

The Court's ultimate muteness in this case reflects the central dilemma of contemporary international law. This is the problem of understanding the place of the state in a system that simultaneously recognizes the state as the source of its norms and interprets those norms in a transnational, principled fashion. We cannot escape this problem by adopting a narrow positivism, looking for example to the literal text of the Charter. The text itself sets forth broad moral norms, including a general prohibition on the use of force.⁷⁰ We must still decide whether to interpret the text in light of its origin in state consent or its invocation of transnational principles of justice. Nor can we resolve the conflict by turning away from text and invoking principled decisionmaking. Survival of the sovereign state can appear to be as much a first principle of an international moral order as justice, peace, or human rights. The perspective of legitimacy is no less principled than that of justification.

It is not the form of legal argument, but the double character of the content of the law that causes the dilemma here. This is a substantive conflict about the place of state sovereignty in the international legal order. If all law must be interpreted through the lens of state sovereignty, we get one answer to the nuclear weapons issue: the answer that protects deter-

mental Shelf (*Greece v. Turk.*), 1978 I.C.J. 3 (Dec 19); *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253 (Dec 20); *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec 20); *Fisheries Jurisdiction (F.R.G. v. Ice.)*, 1974 I.C.J. 175 (Jul 25); *Fisheries Jurisdiction (U.K. and Ir. v. Ice.)*, 1974 I.C.J. 3 (Jul 25); *Nottebohm (Liech. v. Guat.)*, 1953 I.C.J. 111 (Nov 18). See also Mark Weston Janis, *Somber Reflections on the Compulsory Jurisdiction of the International Court*, 81 AM. J. INT'L L. 144, 144-45 (1987).

70. On the similar failures of an appeal to the text in interpreting U.S. constitutionalism, see generally MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* (1994) and RONALD M. DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7-15 (1996).

rence and stumbles over an ultimate right of self-defense. If all law is interpreted through a transnational moral principle of justice, survival of mankind cannot be a value subordinate to state sovereignty. Contemporary international law is caught between these two quite different value schemes: one reflecting the international order as a system of sovereign nation-states and one reflecting transnational norms independent of those states. The nuclear weapons case brings these two different schemes into conflict, without offering any legal grounds for their reconciliation.

In ordinary terms, what would it mean to say that the use or threat of use of nuclear weapons is legally prohibited in all circumstances? Most importantly, this would mean that a state may be legally barred from responding effectively to an attack—even a nuclear attack—upon itself. In the extreme case, a state might have to suffer military defeat, or perhaps annihilation, even when there are weapons available that might prevent this outcome.⁷¹ Minimally, the prohibition would shift the character of the risks that a state faces in military conflicts, both potential and actual. A state that complied with this legal obligation not to threaten to use nuclear weapons might have to invest more resources in conventional weapons, and it might be required to suffer greater military costs for the sake of less predictable outcomes.

Despite the risks to any particular state, the geopolitical logic of a legal prohibition on nuclear weapons is straightforward: nuclear weapons must be prohibited, even in cases of self-defense, because their use would impose costs on the rest of the world greater than the benefits that could be obtained by the individual state. Thus, a state may be required to sacrifice its interest in self-defense to an idea of the greater good of the international order. The argument remains the same re-

71. See, e.g., Nuclear Weapons Advisory Opinion, *supra* note 1, 35 I.L.M. at 834 (separate opinion of Judge Fleischhauer) ("That basic right [of self-defense] would be severely curtailed if for a State victim of an attack with nuclear, chemical or bacteriological weapons or otherwise constituting a deadly menace for its very survival, nuclear weapons were totally ruled out as an ultimate legal option . . ."). Cf. The List Case, TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1272 (Vol. XI, U.S. Gov't Print Off. 1949-1953) ("The rules of international law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation.").

ardless of the conception of the international order that informs the benefit side of the equation—for example, the community of states, the community of the world's people, or even the larger ecosystem that is the planet.

One might attempt to deny that the geopolitical argument really demands any state sacrifice by arguing that a nuclear defense is self-defeating. If a full-blown nuclear exchange would destroy all parties to the dispute—and other states as well—then nuclear weapons are not viable weapons of self-defense. To abandon their use is not to put the state at greater risk. Accordingly, no sacrifice is entailed by a prohibition, because nothing of real value is lost. Even if this were correct as a matter of empirically predicting the scale of any actual nuclear exchange, the argument still does not work. Nuclear self-defense includes the policy of deterrence, i.e., the threat to use these weapons in defense of vital national interests. Nuclear deterrence may be risky, but it is not a logical contradiction. Arguably, it kept a rough peace between the super-powers for fifty years; it may be operating still in the Middle East and the Asian subcontinent. Of course, not all states want nuclear weapons—some because the weapons are too expensive, others because the risks are not worth the benefits, and still others because they accept the geopolitical argument. Yet those that do maintain them are not easily described as simply making a mistake in their military calculations.

Nevertheless, we should not make the analysis depend upon deterrence, which has been much debated both as a matter of logic and practice.⁷² The Court too is reluctant to get into a discussion of deterrence. Deterrence is the threat to use nuclear weapons and, the Court reasons, the threat must carry the same legal value as the use.⁷³ It is in the imagined

72. See, e.g., THOMAS SCHELLING & MORTON HALPERIN, *STRATEGY AND ARMS CONTROL* (1961). See also Regina Cowen Karp, *The Continuing Nuclear Challenge*, in *SECURITY WITHOUT NUCLEAR WEAPONS?* 1-18 (Regina Cowen Karp ed., 1992).

73. See Nuclear Weapons Advisory Opinion, *supra* note 1, 35 I.L.M. at 823, para. 48. In blackmail, a threat to perform an otherwise legal act is illegal, but nuclear deterrence cannot be thought of as a violation independently of the legality of the use of these weapons. On blackmail generally, see George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617 (1993).

use that the real clash of international law values becomes apparent, not in the hope for non-use that powers the practice of deterrence.

The argument against nuclear weapons is deceptively simple, as if it were simply a matter of comparing costs and benefits. The problem is not only that deterrence makes the calculation more difficult by confusing the issue of whether nuclear weapons are a cost or a benefit. The greater problem is determining, in the first instance, the values that enter into the calculus. The straight-forward argument against nuclear weapons assumes the most important normative point: that there are transnational norms of greater worth than the value a state puts on its own continued existence.⁷⁴ If the state is the ultimate source of political value, then the fact that pursuit of self-defense may lead to Armageddon is hardly a conclusive argument. Nuclear weapons policy implicitly makes a claim traditionally associated with sovereignty: "If the sovereign does not continue to exist, then no one will." If the body of the King is the mystical corpus of the state, then the death of the King is the death of the state.⁷⁵ There is no value to preserve once the sovereign dies. Conversely, no sacrifice is too much for the sake of preservation of the sovereign. In more colloquial form: "If not us, then no one."

All of the compelling arguments against nuclear self-defense assume the perspective of an international community that is independent of any particular state. It does not matter whether we reach that trans-state perspective by adopting the human-rights view of the "universal" individual who has a value independent of membership in a state, or by imagining an international community of which states are constituent parts. The human rights perspective displaces the state from below,

74. In his dissent, Judge Koroma accuses the majority of giving legal recognition to the claim "that a state, in order to ensure its survival, can wipe out the rest of humanity by having recourse to nuclear weapons." Nuclear Weapons Advisory Opinion, *supra* note 1, 35 I.L.M. at 926 (dissenting opinion of Judge Koroma). He is correct to see that the logic of sovereignty may include this position, but too extreme in attributing this position to the Court.

75. See ERNST KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY OF MEDIEVAL POLITICAL THEOLOGY* (1957). On popular sovereignty as the modern form of the idea of the King's body, see PAUL KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 190-96* (1996).

attaching peremptory legal rights to the pre-political individual. Alternatively, the primacy of state sovereignty is displaced from above by those who argue that the world is moving into a post-sovereignty period in which law protects what we might call the "international commons:" e.g., the environment, the sea, communications, and world markets. Multiple international regimes cover these areas, each of which has developed its own legal norms that seek a public good beyond the self-interest of any particular member state.⁷⁶

Contemporary international law has been largely characterized by the intellectual and political pursuit of these non-state perspectives. The "action" for the past generation has been with the development of the law of human rights and of international regimes. Both draw on cross-disciplinary approaches, which have been undeniably productive for international legal theory. Human rights approaches reach out to the discipline of moral theory; regime approaches reach out to the study of international relations.⁷⁷ Both approaches attack the tradition of international law built upon the privileged and exclusive place of the state.⁷⁸ They are linked not only in their

76. Arguably, for some states these regimes perform a constitutive role. State identity and state possibilities are defined by the international regimes within which the state always finds itself. See ROBERT JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD* 5 (1990):

The study discloses an image of Third World states as consisting not of self-standing structures with domestic foundations—like separate buildings—but of territorial jurisdictions supported from above by international law and material aid—a kind of international safety net. In short, they often appear to be juridical more than empirical entities: hence quasi-states.

Id.

77. On human rights and moral theory, see, for example, FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (1997); HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY* (1980); MICHAEL WALZER, *ON TOLERATION* (1997). On regimes and international relations, see Robert Owen Keohane, *Comment: International Relations and International Law: Two Optics*, 38 HARV. INT'L L. J. 487 (1997); ROBERT OWEN KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984).

78. For the classic expression of the traditional state-centered view, see the *Lotus Case*, *supra* note 42; *Mavromatis Palestine Concession Case* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Mar. 3):

The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint.

critique of the state, but also in their positive vision of an emerging international order. Once the state is displaced from the normative center, one can imagine a world community made up of individuals who recognize a common humanity in each other, share a common interest in the world environment, and seek an efficient and just distribution of resources in their multiple relationships. The state will be seen as one among any number of intermediate associations constituted by the voluntary acts of rights-bearing individuals, but bound in its behavior by international norms. In this new world, state citizenship will come to be a relatively secondary characteristic, as individuals understand themselves as bearers of universal human rights operating in a global community that includes many forms of association. This is the dominant, normative perspective of international law scholars today.⁷⁹

While there have been numerous legal developments and political events that point in the direction of an emerging post-sovereignty legal order, state possession of nuclear weapons stands as the major check on all such claims. The logic of these weapons makes quite explicit the fundamental and enduring character of state sovereignty. This logic is not just that of a retaliatory capacity put to work in the practice of deterrence. It is the logic of the sovereignty of the nation-state as the ultimate ground of meaning and value for the individual, the political community, and the world. It is a willingness to disregard everything but the state as sovereign. Nuclear weapons, as the judicial opinions tell us over and over, make no distinction between combatants and noncombatants.⁸⁰ They

Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.

Id.

79. The 1990s have witnessed an explosion of writings questioning the continuing place of state sovereignty. See, e.g., *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* (Joshua Cohen ed., 1996); *STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS* (Sohail H. Hashmi ed., 1997).

80. See, e.g., *Nuclear Weapons Advisory Opinion*, *supra* note 1, para. 92, 35 I.L.M. at 829:

In the event of their use, nuclear weapons would in all circumstances be unable to draw any distinction between the civilian population and combatants, or between civilian objects and military objectives, and their effects, largely uncontrollable, could not be

do not recognize a non-political domain of civil society. They subject the entire population of the state to the risk of death. They threaten not just the population of the target and the targeting states, but of neutral states—indeed of all other states. This is not an anomaly brought about by an uncontrolled technological development. It is just the logic of sovereignty. The sovereign nation-state views its own citizens as having value only as members of the political community that is the state.⁸¹ The nation-state, as opposed to its political precursors, extends an ideal of political equality to all members of the state, demanding equal exposure to the risks entailed for the sake of state survival. Looking outward, the sovereign state sees no value in other individuals or communities that can compete with its own survival.

That sovereignty is an absolute value has been part of the modern doctrine of the state at least since Bodin.⁸² By an “absolute value” I mean one that is incomparable with others, as well as the source of all other cognizable values. The modern period begins with the state’s displacement of God from this position of absolute value.⁸³ In the implicit willingness to end history if the state cannot continue, nuclear weapons policy rests on just this understanding of state sovereignty. The modern state refuses to recognize a “history of humanity”—past or future—that makes a normative claim higher than that of the history of the state. Similarly, it refuses to recognize a claim of nature that can compete with and displace its own political life. The sovereign state is the precondition of all other values; it is the gate through which all normative claims must pass. For just this reason, Judge Koroma labels the nuclear bomb

restricted, either in time or in space, to lawful military targets. Such weapons would kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced; and the number of casualties which would ensue would be enormous.

Id.

81. The life of the citizen outside of the political order tends to be understood as the merely “private.” From this perspective, there is no difference between, for example, consumption and religion, or entertainment and moral philosophy. These are matters of subjective preference.

82. JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* (M. Tooley trans., 1967).

83. Arguably, the modern period will end with the displacement of the state by the individual person as the moral absolute.

"the absolute weapon," raising the possibility of "annihilation of the human race," and Judge Weeramantry speaks of nuclear weapons as creating a "limit situation" because they have the potential to "destroy all civilization."⁸⁴ These are not incidental effects of the technology. Rather, they are the reciprocal image of a kind of deification of the nation-state as the political absolute. If state sovereignty is the only source of value, then the state cannot and will not yield to the interests of others, regardless of how those other values are defined.

The International Court acknowledges the disjunction between the use or threat to use nuclear weapons and any transnational perspective when it writes: "The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet."⁸⁵ These weapons are an offense to the very idea of an international order independent of the state's interests. They threaten simultaneously man in his transnational character, the communal character of international society, and nature in its prepolitical character. While instruments of state policy, they threaten to destroy both history as a field of policy-making that extends across civilizations and the ecosystem as the background condition of all that the state does. They do not, however, do this through some sort of mistake, as if state policy makers were unaware of potential consequences of a nuclear exchange. Nuclear weapons pose these threats because they express the logic of state sovereignty, under which the state alone gives value to individuals, civilization and the ecosystem. For the Court to declare their use or threatened use illegal would be to set international law firmly against this conception of state sovereignty.

Regardless of the development of human rights law and multiple international legal regimes, as long as states maintain a policy of nuclear self-defense, it is difficult to argue that the age of state sovereignty is over. Nuclear weapons are a constant reminder that the state's interests come first and last, that all individuals—citizens and noncitizens alike—may be sacrificed to the primacy of the sovereign state. These weapons

84. Nuclear Weapons Advisory Opinion, *supra* note 1, 35 I.L.M. at 925 (dissenting opinion of Judge Koroma); *id.* para. 7, 35 I.L.M. at 886 (dissenting opinion of Judge Weeramantry).

85. *Id.* para. 35, 35 I.L.M. at 822.

rest implicitly on a policy of conscription that extends to every citizen—and even beyond—for which no exemptions are granted. This is true despite the limited number of nuclear-weapons states. As long as just one state maintains the capacity and willingness to push history and civilization itself beyond the edge for the sake of its own continued existence, we cannot say that we have reached an era of subordination of state sovereignty to a transnational perspective.

If the logic of nuclear weapons is the logic of the sovereign state, then the question posed to the Court by the General Assembly goes to the very heart of international law. It raises the issue of the foundation of the whole edifice of international law at a moment of substantial confusion and possible transition. What is the role of the state in the future of international law? This is the hardest question of all, harder even than that of the legality of nuclear weapons, because it is the starkest version of the question presented by these weapons.

IV. READING CONVENTIONS

A. *On Human Rights, Genocide, and the Environment*

The substantive legal analysis of the opinion begins with the rejection of three possible transnational perspectives that together cover the most dramatic developments in contemporary international law. They are the perspectives of an international law of human rights, of genocide, and of the environment. To the ordinary observer, these three perspectives are the appropriate points at which to begin consideration of the issue before the Court. If asked to explain the problem with nuclear weapons, most people would argue that such weapons violate the essential dignity of the individual, threaten to destroy entire groups of individuals who together maintain a unique cultural or ethnic history, and undermine man's necessary trusteeship for the environment of the planet. These are all values that reach beyond the interests of any single state. Together they describe a contemporary sensibility characteristic of many members of the cosmopolitan community.

All three perspectives have in common a displacement of the state from its position at the center of international law. Each denies a primacy to the state as the source and ultimate end of international law. Human rights law seeks to establish a priority of the individual over the interests of the government,

acting in the name of the state; the law of genocide protects certain groups from the state; and environmental law values nature over the interests of geopolitical subdivisions. The assault on state sovereignty that is characteristic of much recent scholarship is represented by these three values. Individual dignity, group membership and the environment define a post-sovereign-state politics that many have sought to establish as the foundation for contemporary international law.

Thus, before the Court reaches the specific body of international law concerning the means and methods of warfare, it must address the legal claim, supported by popular intuition, that nuclear weapons constitute a challenge to the "international" character of contemporary international law. If international law rests on these three transnational principles, i.e., if these are the norms that justify international legal obligations, then there is no justification for failing to extend these values to that which constitutes the greatest threat to their realization. Not just a part, but the whole edifice of an international legal system that protects persons, groups and nature is threatened by nuclear weapons.

If the law of human rights protects individuals from physical abuse at the hands of state officials, but leaves them open to nuclear holocaust, it appears to be arbitrary and irrational. Again, on what principle can the genocide convention protect groups from intentional efforts to destroy them,⁸⁶ but be indifferent to the far greater destruction such groups would suffer in a nuclear war? And if environmental law is about protection of nature, what is the principle that would protect nature from particular pollutants but not from total destruction? If international law purports to be principled, how can these principles fail to apply to the use of nuclear weapons? But is contemporary international law defined by these normative justifications or is it about state interests as perceived by the nation-states of the world and expressed in their consent to specific legal propositions?

86. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. I, 78 U.N.T.S. 277 ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.").

The Court's reading of conventional law in each of these three areas always keeps in view the fact of state consent as the legitimating source of that law. It reasons from the proposition that because all three areas of contemporary international law—concerning human rights, genocide and the environment—emerge from the consensual actions of states, that law must reflect the supreme interests of these states. It understands the maximum or absolute point of state-interest as that of self-defense. Thus, the conventions protecting human rights do not displace the laws on the conduct of warfare, because the states responsible for the creation of human rights law did not understand that law as an attempt to make effective Article 2(4)'s prohibition on the use of force. They were not attempting an end-run around Article 51's recognition of a right of self-defense; nor did they intend to displace "the applicable *lex specialis*, namely, the law applicable in armed conflict."⁸⁷ Similarly, the law of genocide is only relevant if there is a "genocidal intent."⁸⁸ The Genocide Convention was not intended to eliminate the doctrine of double effect as classically applied to the use of force.⁸⁹ And environmental treaties could not "have intended to deprive a State of the exercise of its right of self-defence . . . because of its obligations to protect the environment."⁹⁰ No state, the Court seems to reason, would consent to a law that might require of it a sacrificial act for the sake of other peoples, other states, or the natural environment.

In each instance, self-defense emerges as a limit on any interpretation of state consent. Instead of fundamental principles of the international legal order, the interests in human rights, group rights, and the environment, which stand behind

87. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 25, 35 I.L.M. at 820.

88. *Id.* para. 26, 35 I.L.M. at 820 ("The Court would point out in that regard that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.").

89. On the doctrine of double effect, see, for example, MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 152-59 (1977).

90. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 30, 35 I.L.M. at 821.

these bodies of conventional law, become side-constraints. They are interests a state should respect to the extent that it can while pursuing its continuing legal right of self-defense. Thus, the Court concludes that "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives."⁹¹ The same is true of individual and group interests in survival. They are not enforceable principles of law, but rough guidelines within a practice of self-defense. This is the same move from law to politics—from an authoritative command to a guide to political practice—that characterizes the Court's general conclusion: Nuclear weapons are not now illegal, but political practice should continue toward the goal of making them illegal.⁹²

In the initial confrontation in the opinion between the perspectives of legitimacy and justification, the Court sides with the former. We find the same approach to conventional law appearing two more times in the opinion. Now the issues involve the interpretation of specific conventions regulating state recourse to force. The Court considers the legal regulation of poisonous weapons and the recent efforts to declare certain areas nuclear-free zones.

B. *Weapons Regimes*

There is a history of legal regulation of weapons that poison and asphyxiate.⁹³ Nuclear weapons poison and asphyxiate on a much broader scale than the weapons that were specifically targeted in these conventions, which predate the nuclear age. If the international community enacted a legal prohibition on the less threatening weapons, surely it follows as a matter of moral logic that the same rule prohibits the more threatening weapons. There is no reason—i.e., no rational justification—to prohibit the former, but allow the latter. Once we discern the principled character of the rule—e.g., weapons that spread amorphous clouds of death are immoral—we see that the justification applies equally to nuclear weapons.

91. *Id.*

92. *See supra* note 50 and accompanying text.

93. *See supra* note 13.

This sort of normative argument is extremely common in international law. It appears whenever a series of positive-law steps regulating a particular subject is subsequently interpreted as the establishment of a rule of customary law. For this reason, the line between treaty law and customary international law is never sharp: every treaty can be read as an instance of a more general rule. The classic expression of this form of argument is found in *The Paquete Habana*, in which the U.S. Supreme Court read a general rule that coastal fishing vessels are immune from hostile naval blockades out of a series of discrete treaty arrangements and reciprocal accommodations among warring parties over several centuries.⁹⁴ Why some fishing vessels but not others, when all fishermen make an equally compelling moral claim? If a state respects the distinction between threatening and non-threatening vessels in some places, why not everywhere? Moral justifications are not geographically bounded.

By consenting to the particular, states may find themselves bound to a general rule. They are bound despite the fact that there may never have been a moment at which the principle was the subject of explicit state consent. Nevertheless, that to which consent was given is subsequently understood to rest on a principle, and to deny the principle is to behave irrationally. The interpreter of the law reads the particular act as a step—perhaps a final step—in a continuing effort to establish the general rule. That is what makes it rational behavior. There is an implicit norm of progress in the structure of legal interpretation here. Particular acts of law-making are understood as efforts to achieve a formal order of law in which general principles are equally applicable to all similar cases. The conceptual structure of this argument is the same whether it is used to interpret conventional law, to argue that convention has

94. See *The Paquete Habana*, 175 U.S. 677, 708 (1900):

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and *independently of any express treaty or other public act*, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels . . . are exempt from capture as prize of war.

Id. (emphasis added).

passed into custom, or that custom has established a *jus cogens* norm.

Despite the attractions of this style of argument, the majority opinion rejects its use to find a broad principle, within conventional law, applicable to nuclear weapons. With respect to the logic of poisonous asphyxiation, the Court merely says "the parties to those instruments have not treated them as referring to nuclear weapons."⁹⁵ Accepted as a general principle of legal interpretation, this argument would end the case. Surely the policy of nuclear deterrence and the development of nuclear weapons suggest that at least the nuclear-capable states have not treated any existing law limiting armaments or methods of warfare "as referring to nuclear weapons." Their practice has been just what the Court refers to in order to defeat this argument of justification: "The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments."⁹⁶ No such specific agreement covers the nuclear weapons practices of these states. This observation, however, hardly suffices by itself to establish the claim that the specific instruments must be read as steps toward a future state of international law in which nuclear weapons will be prohibited—the Court's view—rather than as instances of a general prohibition that already applies to nuclear weapons—the view of the dissenters.⁹⁷ Again, we see the Court limiting its interpretation by its concern for legitimacy and linking legitimacy to self-defense.

The dissent of Judge Weeramantry takes a narrower tack, arguing that even on a literal reading of the Geneva Protocol on Poisonous Gas, which prohibits the use of "poisonous

95. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 55, 35 I.L.M. at 824.

96. *Id.* para. 57, 35 I.L.M. at 824.

97. *See id.* para. 7, 35 I.L.M. at 866-67 (dissenting opinion of Judge Shahabuddeen):

The General Assembly could well consider that certain conduct would be a crime under existing law and yet call for the conclusion of a convention on the subject A convention may be useful in focusing the attention of national bodies on the subject, particularly in respect of any action which may have to be taken by them; it may also be helpful in clarifying and settling details required to implement the main principle, or more generally for the purpose of laying down a regime for dealing with the illegality in question.

Id.

materials," nuclear weapons are prohibited.⁹⁸ On his view, the Protocol covers all poisons that involve contact with the human body. Nuclear weapons represent merely a change in the technology to which this general prohibition applies. Instead of mustard gas, the poison is now nuclear radiation. That states did not foresee such a development of poisonous weapons is simply irrelevant to the legal question. They bound themselves to the principle of no poison gas. Indeed, if states agreed not to use poisonous weapons when such weapons represented only minor increments to the military arsenal, the same principle of non-use must cover a poisonous weapon that is a major increment. The more threatening the weapon, the more reason there is to adhere to the principle that prohibits the class within which it falls.

Weeramantry's argument shows us that the dispute here is not really a matter of deciding between positivist and nonpositivist approaches to international law. In his interpretation of the Protocol, he offers a positivist resolution of the case in favor of the anti-nuclear interests.⁹⁹ Yet, Weeramantry's argument is not very convincing. If nuclear weapons are illegal, it cannot be because the world just happened to be lucky enough to have hit upon the right language in a conventional treaty arrangement prior to their invention.

It cannot be an accident of history, our good fortune, that there exists a convention under which nuclear weapons are already banned, and thus no new legal effort is required by us or by future generations. There is a difference in kind between mustard gas in the trenches of the First World War and mutual assured destruction. Warfare has moved from a limited instrument of state policy to a decision about the meaning

98. *See id.* para. 12, 35 I.L.M. at 908 (dissenting opinion of Judge Weeramantry):

The case that nuclear weapons are covered by the Geneva Gas Protocol seems therefore to be irrefutable. Further, if indeed radioactive radiation constitutes a poison, the prohibition against it would be declaratory of a universal customary law prohibition which would apply in any event whether a State is party or not to the Geneva Protocol of 1925.

Id.

99. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 12, 35 I.L.M. at 907 ("Quite independently of the various general principles that have been invoked in the discussion . . . there is a conventional basis on which it has been argued that nuclear weapons are illegal.").

and shape of history. It may be that the state should not have this ultimate power. Nevertheless, its existence poses a genuinely novel issue. International law includes a traditional doctrine of "changed circumstances," *rebus sic stantibus*, to avoid just such results.¹⁰⁰ The conditions for the continuation of civilization did not just happen to be legally regulated in prior considerations of appropriate conduct on the battlefield.

If this is correct, then the search for a legal instrument's meaning cannot go forward independently of the context of its application. Principles are not abstractions that rule blindly. The Court's insistence that the principles of justification of conventional law must be limited by considerations of legitimacy is just such an expression of the need to contextualize the interpretation of principles. This approach is not novel. It is fully consistent with the Vienna Convention of the Law of Treaties, which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*."¹⁰¹ Yet, even this argument merely shifts the debate to the characterization of this "context." Is the context best understood from the perspective of self-defense of the autonomous state or from that of the threat to civilization and nature? The Court's interpretive approach, placing legitimacy above justification, remains no less a choice than the alternative approach.

This same pattern of reasoning appears in the Court's consideration of a second set of conventional agreements: those limiting the acquisition, possession, and deployment of nuclear weapons.¹⁰² Again, a principle of justification that informs these particular conventions and extends to this case can be clearly stated: "a rule of complete legal prohibition of

100. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 62, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

101. *Id.* art. 31, para. 1 (emphasis added).

102. See Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 762, T.I.A.S. No. 7137, 6 I.L.M. 521; Treaty on Nuclear-Weapon-Free Zone of the South Pacific, Aug. 6, 1985, 24 I.L.M. 1440; Treaty on the Prohibition of the Employment of Nuclear Weapons of Mass Destruction on the Sea Bed and Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 703, T.I.A.S. 7337.

all uses of nuclear weapons.”¹⁰³ From the perspective of moral logic, there are not good and bad uses of such weapons, as if some areas of the world are appropriate targets for nuclear destruction and some are not. But once again, the Court resists such a reading by looking to the legitimating source of the conventions: state consent. It does so by distinguishing between the moment of origin of the conventions and some future time in which there may be enacted a “general prohibition of the use of such weapons.”¹⁰⁴ Indeed, these agreements codify their own normative goal: complete nuclear disarmament.¹⁰⁵ This reliance on calendrical time, distinguishing between what has been done and what remains to be done in the future—*lex lata* and *lex feranda*—is another means of shifting from arguments about normative justification to those of legitimacy. Thus, only three judges out of fourteen support the proposition that there is currently a universal prohibition on the threat or use of nuclear weapons.¹⁰⁶ However, the Court is unanimous in its judgment that there exists an obligation to “bring to a conclusion negotiations leading to nuclear disarmament.”¹⁰⁷

One has to give up completely the perspective of legitimacy to claim that these conventions put in place a principle of justification that makes nuclear weapons illegal. Just as the majority cannot read the prohibition on the use of force imposed by Article 2(4) of the U.N. Charter without recognizing the limit of Article 51’s acknowledgment of the right of self-defense, it cannot read these more particular conventional acts outside of a context in which precisely what was *not* accepted was a general principle prohibiting all possession or de-

103. See Nuclear Weapons Advisory Opinion, *supra* note 1, 35 I.L.M. at 825, para. 60.

104. *Id.* para 62, 35 I.L.M. at 825.

105. See Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, art. VI, 21 U.S.T. 483, T.I.A.S. No. 6839 (“Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating . . . to nuclear disarmament, and on a treaty on general and complete disarmament.”).

106. See Nuclear Weapons Advisory Opinion, *supra* note 1, para. 105(2)(B), 35 I.L.M. at 831.

107. *Id.* para. 105(2)(F), 35 I.L.M. at 831.

ployment of nuclear weapons.¹⁰⁸ The political cost of obtaining the consent of the nuclear-weapons states to these territorially limited regimes of nondeployment has been the explicit acknowledgment of their nuclear defense policies by the non-nuclear states. The conventions explicitly recognize two categories of states—nuclear and non-nuclear—and specify different obligations for each.¹⁰⁹ Arguably, the problem for more than a generation—the problem that led to the request for an advisory opinion in this case—has been that there is no convention prohibiting nuclear weapons. It would be distinctly odd for the Court to have concluded that there really was such a convention all along.

If the source of conventional law is specific acts of state consent, then the perspective of legitimacy provides a reasonable limit on the principles available in arguments of justification. Principles of justification are extended too far if it is the case that one simply cannot imagine a state expressing consent to the principle. This would make international law a kind of game that the states play at their own risk, but without even knowing the rules in advance.¹¹⁰ Is it possible to say that through some sort of diplomatic misjudgment, the nuclear states consented to making their own behavior in this respect illegal, that they bound themselves not to do that which they think most important to do?

V. CUSTOMARY LAW

A. *The Normative Priority of Customary Law*

The Court rejects conventional law arguments in support of a nuclear weapons prohibition because it cannot separate that law from the conditions of its own creation. It declines to read a justification into that law which would contradict the consensual principle grounding the law's legitimacy. Custom-

108. *See id.* para. 62, 35 I.L.M. at 826 (“[E]ven within this framework, the nuclear-weapon States have reserved the right to use nuclear weapons in certain circumstances.”).

109. *See* Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, art. I, 21 U.S.T. 483, 729 U.N.T.S. 161 (listing duties of nuclear weapon states); *id.* arts. II, III, para. 1 & III, para. 4 (listing duties of non-nuclear weapon states).

110. *See* H.L.A. HART, *THE CONCEPT OF LAW* 140-41 (1961) (describing failure of rule-bound enterprise when applications are unpredictable).

ary international law, however, is another matter. By its very nature, customary law shifts attention away from arguments appealing to state consent. It does not rely on a model of contracting parties, but of parties operating within a context of already-established practices in which certain values are understood to be of legal significance. Lacking an identifiable moment at which a particular rule of law originates, customary law gives primacy to arguments of justification. Interpretation focuses on the reasonableness of the ordered relationship among states, which is understood to be carried forward in customary legal practice.

Just this potential for recognizing a general rule continues to give a normative priority to customary international law in scholarship and adjudication, even though the U.N. Charter sets forth an ideal of progressive codification and even though political actors have the same preference for positive law at the international level that they have at the domestic level.¹¹¹ Domestically, we live in a world in which common law rules have been largely displaced by positive law in the form of statutes and regulations. In this country, codification was a serious law-reform issue at the end of the nineteenth century. The codifiers won that battle.¹¹² Codification has always been the norm in continental legal systems. Codification, particularly in the form of multilateral treaties, has become increasingly characteristic of contemporary international law as well. Nevertheless, we have to distinguish quantitative extension from normative value. Customary law has normative priority, especially in the law of war and peace.

Customary law has the normative advantages of universality, nonderogability, and, most importantly, a greater openness to judicial interpretation and application. Thus, in the *Nicaragua Case*, the International Court could conclude that although it was barred for jurisdictional reasons from applying multilateral treaties, including the U.N. Charter, it was nevertheless free to adjudicate the dispute under what were essen-

111. See U.N. CHARTER art. 13, para. 1(a).

112. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982) ("The last fifty to eighty years have seen a fundamental change in American law. In this time, we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law.").

tially the same legal standards, understood as expressions of customary law.¹¹³ That the standards regulating use of force had moved from conventional to customary law was seen as a sign of progress in international law. They are not “merely” conventional law, but universal norms from which a state cannot withdraw its consent. In the nuclear weapons case, the Court traces just this movement with respect to humanitarian law: what started as convention has become “intransgressible principles of international customary law.”¹¹⁴ The same normative logic explains the impulse to claim customary law status for environmental norms, despite the weak state of conventional environmental law.¹¹⁵ The same model of progress informs a third step: from customary law to *jus cogens* norms. The normative hierarchy moves from treaty, to custom, to *jus cogens*. Not surprisingly, the applicable norms of humanitarian law are argued to have transited all three steps and, thus, to have achieved *jus cogens* status.¹¹⁶ Similar arguments are made for human rights law: it has passed from convention, to custom, to *jus cogens*.

As a rule attains the status of *custom*, its origin in particular legitimating acts of state consent drops from view. Correspondingly, the underlying normative principle that justifies the rule fills the field of vision. The normative pull of custom-

113. See Nicaragua Case—Merits, *supra* note 43, at 146-49.

114. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 79, 35 I.L.M. at 827.

115. See *id.* para. 6, 35 I.L.M. at 901 (dissenting opinion of Judge Weeramantry):

Parallel to the developments in human rights, there has been another vast area of development—environmental law, which has likewise heightened the sensitivity of the public conscience to environmentally related matters which affect human rights. As observed by the International Law Commission in its consideration of state responsibility, conduct gravely endangering the preservation of the human environment violates principles “which are now so deeply rooted in the conscience of mankind that they have become particularly essential rules of general international law.”

Id. (quoting 11 Y.B. INT’L L. COMM’N 109, para. 33 (1976)). See also GREENING INTERNATIONAL LAW (Phillipe Sands ed., 1994).

116. See, e.g., Nuclear Weapons Advisory Opinion, *supra* note 1, para. 83, 35 I.L.M. at 828. Indeed, Soviet jurists claimed that “all fundamental principles” of modern international law had *jus cogens* status. See Grigory Tunkin, *International Law in the International System*, in 147 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACAD. OF INT’L L. 1, 98 (1975).

ary law is not located in the universality of consent, but in the justification for the law—i.e., its normative attractiveness.¹¹⁷ When the norm passes into the domain of *jus cogens*, the legitimating origin in state consent has disappeared completely: the *jus cogens* norm is beyond change and thus beyond consent. An international legal order that failed to respect the norm could not be justified and is, therefore, beyond the legal imagination. The norm expresses something fundamental about the order of international law as a normative whole. Thus, *jus cogens* claims identify the place or places at which the claimant locates her fundamental beliefs about the international legal order. For this reason, these claims can appear widely disparate, replicating the fundamental tension of the contemporary international legal order. On the one hand, claims are made for the *jus cogens* character of the essential attributes of state sovereignty; on the other hand, similar claims are made for human rights norms that oppose state sovereignty.¹¹⁸

B. Customary Humanitarian Law

While the scope of applicable customary law has been substantially limited by the Court's earlier approach to issues of human rights, genocide, and the environment, the Court cannot similarly resist customary humanitarian law.¹¹⁹ The judicial precedents, which include the holding of the Nuremberg Tribunal, are too strong. More importantly, claims that there is such a customary law are an important part of the self-understanding of the international legal system. These claims support the idea that progress in international law means the marginalization and containment of state violence and that the end-point of the legal process would be strictly delimited parameters on state recourse to violence. If these norms have not passed into customary law, then the legal system as a whole

117. See FRANCK, FAIRNESS, *supra* note 57, at 3-9 (arguing that sovereignty has historically been an overrated factor in relations between states).

118. This conflict can already be found in a 1937 article by A. von Verdross, often cited as an early source of the modern doctrine of *jus cogens*. A. von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 575 (1937) (identifying as legally void treaties that would violate human rights and treaties that would prevent a state from exercising the right of self-defense).

119. See Nuclear Weapons Advisory Opinion, *supra* note 1, para. 82, 35 I.L.M. at 828.

has a tenuous relationship to state violence. The system would be dependent on the continuing consent of the acting states to remain within the system of legal regulation. Violence would be regulated by law only as long as states chose to self-regulate, i.e., only as long as they did not exercise an exit option.¹²⁰ In the 1930's, for example, Germany withdrew from participation in the League of Nations. The withdrawal was legally permissible.¹²¹ The Nuremberg Tribunal nevertheless applied the customary law of war and peace to Germany's use of violence.

Accordingly, the Court must consider the norms of customary humanitarian law and decide to what degree they bear on nuclear weapons. It easily concludes that no new customary law rule has emerged directly concerning nuclear weapons: practice and *opinio juris* have been too conflicted in the last fifty years to support a claim for such a rule. One can readily understand the difficulty of reading customary international law out of the policy of nuclear deterrence. Does this policy demonstrate a willingness to use these weapons or a belief that they are never to be used? Those who make the nuclear threat and those who may suffer the consequences without the capacity to make the threat are likely to have radically different views.¹²²

120. The Vienna Convention on the Law of Treaties suggests that some treaties may not be subject to withdrawal. Vienna Convention, *supra* note 100, art. 56. The argument for non-withdrawal, however, could only be that the treaty sets forth a customary-law norm. See Treaty on the Non-Proliferation of Nuclear Weapons, art. X(1), *supra* note 109 ("Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events . . . have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance."); William Epstein & Paul C. Szasz, *Extension of the Nuclear Nonproliferation Treaty: A Means of Strengthening the Treaty*, 33 VA. J. INT'L. L. 735, 737 n.3 (1993) ("On March 12, 1993, North Korea became the only party to the NPT to invoke the withdrawal clause. . . . Subsequently, North Korea suspended its withdrawal notice.") (citations omitted).

121. See LEAGUE OF NATIONS COVENANT art. 1, para. 3 ("Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.").

122. The dichotomy is not quite so clear since non-nuclear states may enjoy the security of a nuclear umbrella. See E. Häckel, *Towards Non-nuclear*

The Court reduces the field of relevant customary law to that which "existed" before nuclear weapons were invented. It notes that "the Nuremberg International Military Tribunal had already found in 1945 that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 'were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war.'"¹²³ That this was an accurate statement of the law in 1945 is surely contestable in light of the actual conduct of the war that had just concluded. The statement was made by a tribunal constituted by the victors. It was, in part, a way of giving a legal gloss to the winning side. Thus, the War did not just set political adversaries against each other. Rather, it was seen as a vast conflict between good and evil, between those who would uphold the rule of law and those who would violate it.¹²⁴

Regardless of the accuracy of the Nuremberg Tribunal's statement about the law as it existed in 1945, that Tribunal enjoyed the prerogative of all high courts: their declarations of law are constitutive of their own truth.¹²⁵ Not only is the Nuremberg Tribunal still regarded as the paradigm for the institutional arrangements of a fully mature system of international law, but its legal conclusions are endlessly repeated as statements of law.¹²⁶ In the field of customary international law,

Security: Costs, Benefits, Requisites, in SECURITY WITHOUT NUCLEAR WEAPONS? 56, 58 (Regina Cowen Karp ed., 1992) ("One major purpose of international non-proliferation policies, consummated in the Non-Proliferation Treaty (NPT) of 1968, was therefore to bar [Germany, Japan, and Italy] from acquiring nuclear weapons; as a corollary, they were given security assurances under the nuclear umbrella extended by the United States."). See also S.C. Res. 984, 50th Sess., U.N. Doc. S/RES/984 (1995) (welcoming "the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used").

123. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 80, 35 I.L.M. at 827 (quoting 1 International Military Tribunal, Trial of the Major War Criminals 254, 14 November 1945—1 October 1946 (Nuremberg, 1947)).

124. On the association of international law with the Allied war effort, see *From Nuremberg to the Hague*, *supra* note 17, at 7-8.

125. See KAHN, *supra* note 75, at 168-72.

126. On the history of international criminal courts, see BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARDS WORLD PEACE

repetition creates law: saying it does make it so, if the right parties say it often enough.

Not only did the Nuremberg Tribunal's judgment link conventional and customary law, but conventional humanitarian law also takes positive steps to avoid a narrow reading of its justificatory principles. The Martens Clause, first included in the Hague Convention of 1899 and repeated as recently as the 1977 Additional Protocol I, states:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.¹²⁷

The Martens clause brings about a kind of circularity between conventional and customary humanitarian law. As a matter of convention, it says to apply custom. Through the Martens clause, conventional law itself declares the existence of customary law norms.

In the nuclear weapons case, the Court provides a concise statement of the "cardinal principles" of customary humanitarian law. There are just two principles: (1) "[s]tates must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets;"¹²⁸ and (2) "it is prohibited to cause unnecessary suffering to combatants."¹²⁹ Use of a weapon that fails to discriminate between combatants and civilians or that causes unnecessary suffering to combatants constitutes a violation of customary humanitarian law. States "do not have unlimited freedom of choice of means in the weapons they use."¹³⁰

By these two criteria of customary humanitarian law, virtually all of the warfare of this century has been conducted in an illegal manner. Customary humanitarian law clearly does not

(1980). Two *ad hoc* tribunals are currently operating, with respect to the events in the former Yugoslavia and in Rwanda.

127. Protocol I, *supra* note 11, art. 1, para. 2.

128. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 78, 35 I.L.M. at 827.

129. *Id.*

130. *Id.*

refer to the actual war-making practices of states. These cardinal principles are certainly not a reflection of modern military practice. Modern defense policy has been marked, in part, by the phenomenon of the "arms race." That race has not generally been to develop new weapons that more adequately meet the criteria of holding noncombatants harmless and preventing unnecessary suffering.¹³¹ Modern military practice has instead been based on the perception of a necessary connection between military and industrial strength—understood as both a capacity for technical innovation and mass production. War and preparation for war have been pursued as endeavors of the entire nation. Denial of a strict boundary between combatant and noncombatant has characterized both conventional and unconventional warfare. In this respect, there is little difference between aerial bombardment and terrorist bombing. Both bring war directly to the civilian population. With respect to the "unnecessary suffering of combatants," one hardly knows where to begin the analysis in a century that began with trench warfare and ended in a fiery inferno on the roads outside of Kuwait City.

When we consider domestic law, it is usually the case that we can infer a society's law by observing the ordinary practices of its citizens.¹³² The international law of war and peace does not have this quality: we could not infer the content of this law from observing the practices of states either in their decisions to use force or in the manner in which they deploy force. This asymmetrical quality between law and practice opened the Nuremberg Tribunal up to accusations that it was not applying the rule of law but only a kind of "victor's justice."¹³³ Indeed, from the perspective of those who sought an advisory opinion on nuclear weapons from the International Court, there must be something retrospectively ironic about any reliance on the Nuremberg Tribunal. That Tribunal was presided over by a

131. On the actual uses of "smart weapons," see *supra* note 9.

132. This relationship between social practices and legal inference is the ground of Hart's theory of the "rule of recognition." See generally HART, *supra* note 110.

133. See generally TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 641 (1992); A. Levy, *Criminal Responsibility of Individuals and International Law*, 12 U. CHI. L. REV. 313 (1945); G. Manner, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, 37 AM. J. INT'L L. 407 (1943).

judge from the United States, which had just used nuclear weapons to destroy two Japanese cities, along with judges from the other countries about to enter the nuclear arms race. If nuclear weapons violate customary international law, then the problems of Nuremberg were not confined to ignoring that the victors violated some of the same norms that they applied to the losers. Rather, there are prospective problems as well. Nuremberg marks the transitional moment at which nuclear weapons policy came to dominate the defense policy of the major powers and thus the moment that international relations arguably became "illegal" at its core.

Despite this, Nuremberg remains a kind of icon of international legal possibility, informing a vision of international criminal law that works directly on individuals.¹³⁴ This law would control state policy by regulating those responsible for establishing and carrying out these policies. That the Nuremberg model of criminal prosecution was not repeated for close to fifty years suggests that there was something deeply problematic in its attempt to bypass the state and move directly to the individual. We can get some sense of the scope of that problem by imagining the nuclear weapons case not as a request for an advisory opinion from the Court, but as an international criminal prosecution brought against those individuals responsible for creating and maintaining a national defense policy based on nuclear weapons.¹³⁵ The recent reemergence of international criminal tribunals is not accidentally occurring at the peripheries of the modern system of sovereign states, i.e., at places where an ethnic nationalism has displaced the ideological politics of the modern state. Fifty years after Nuremberg, individual criminal responsibility still does not match our general sense of citizen responsibility in

134. See, e.g., OPPENHEIM'S INTERNATIONAL LAW, *supra* note 41, at 506:

The principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal were affirmed unanimously by the United Nations General Assembly in 1946. Since then there has been an increasing trend towards the expansion of individual responsibility directly established under international law.

Id.

135. Cf. BERTRAND RUSSELL, WAR CRIMES IN VIETNAM (1967) (describing a tribunal, convened in Paris, France, to adjudicate war crimes committed by the United States in Vietnam).

the nation-state. Loyalty to the state remains a political virtue stronger than most claims of international law.¹³⁶

The customary law of humanitarian warfare continues to have the odd quality that it had when the Nuremberg Tribunal made its announcement at the end of the Second World War. Much of the weaponry used, even before Hiroshima, failed to distinguish civilians from combatants and could not possibly be described as designed to limit the suffering of combatants. This was the war of saturation bombing, of unrestricted submarine warfare, of long distance artillery, of incendiary bombings, of flamethrowers, land mines, and machine guns. The burden on the Nuremberg Tribunal was to find a customary law that had been established before the conduct of the War occurred, in order to evaluate that conduct against an existing standard. Without this, it would have been applying law retrospectively, which would have violated the Tribunal's own sense of the rule of law.¹³⁷ Instead of focusing the customary law inquiry on the actual practices of twentieth century warfare, the Nuremberg Tribunal focused on the practice of declaring what the law is. This may be the customary practice of politicians, but not of armies at war.¹³⁸ The numerous conventions at the Hague and Geneva provided the grounds for an argument that the humanitarian law had passed from convention to custom. This practice of declaring law, however, never had much to do with the actual conduct of war, at least insofar as the "cardinal principles" were concerned.

The International Court found itself in the same position as the Nuremberg Tribunal in trying to locate the sources of customary international law. It, like the Nuremberg Tribunal, had to decide whether the relevant practice is that of the state's war-making institutions or its law-declaring faculties. It, too, turns away from the practice of war in a nuclear age, by

136. Within the European Union (EU), a substantial experience with international courts has developed, but this has not included criminal jurisdiction. Moreover, the EU may not be a model for an emerging international order as much as a transformation of the political communities of Europe into a single super-state. See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

137. See *From Nuremberg to the Hague*, *supra* note 17, at 8-11.

138. See *Prosecutor v. Tadic*, Int'l Crim. Trib. for the Former Yugoslavia, Appeals Chamber (Oct. 2, 1995) (decision on defense motion for interlocutory appeal on jurisdiction), *reprinted in* 35 I.L.M. 32.

projecting the origins of customary law into the distant past. The relevant customary rules "had evolved prior to the invention of nuclear weapons."¹³⁹ Indeed, they had evolved prior to both world wars, and thus outside of the conduct of twentieth century war altogether. Rather than look at state nuclear practices that began with Hiroshima and continued through the policy of deterrence in the Cold War, the Court says simply that it shares the view "of the vast majority of states as well as writers [that] there can be no doubt as to the applicability of humanitarian law to nuclear weapons."¹⁴⁰

States supporting this view include the nuclear weapons states themselves. Yet, it is hard to see these official acknowledgments of applicable law as anything other than hypocrisy, willful ignorance on the part of the lawyers, or tactical legal efforts to avoid the real issue by spinning hypotheticals. One can imagine "clean" uses of nuclear weapons—i.e., uses that violate neither "cardinal principle"—somewhere out at sea against isolated naval forces, but such a reach of the imagination hardly goes to the heart of this case. It would have been a sterile, empty decision that concluded that because such a theoretical possibility cannot be entirely ruled out, the Court could not conclude that the use of nuclear weapons is *never* permitted. The lawyers may have intended this argument, but it would have been a disservice to the law and to the Court to have accepted such a tactical escape from the real issue.¹⁴¹ Such an answer might only have invited a resubmission of the request by the General Assembly, but phrased in a slightly different manner to avoid this tactical loophole.

139. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 85, 35 I.L.M. at 828.

140. *Id.*

141. *See id.* para. 91, 35 I.L.M. at 829 (citing United Kingdom Written Statement at 53). *See also id.* para. 94, 35 I.L.M. at 829:

The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the 'clean' use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.

Id.

When the Court directly confronts the application of its two principles of customary humanitarian law to the possibility of nuclear war, it reaches the only possible conclusion: "the use of such weapons in fact seems scarcely reconcilable with respect for such requirements."¹⁴² There is no need to support this claim with statistical projections of injuries. Knowledge of the consequences of nuclear warfare is part of the burden of modern life. Knowing that we stand at the edge of our own destruction of civilization and of nature is part of what defines the modern sensibility, just as a knowledge of God's providence described a pre-modern sensibility.¹⁴³ President Bedjaoui writes: "For half a century now these terrifying weapons . . . have entered into all calculations, all scenarios, all plans. Since Hiroshima . . . fear has gradually become man's first nature."¹⁴⁴

No other conclusion would be reasonable for the Court, if it insists that nuclear weapons are subject to the two principles of customary humanitarian law. In a moment of legal formalism, the majority nods toward the lawyers' tactical retreat through extreme hypotheticals: "Nevertheless the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles . . . in armed conflict in any circumstance."¹⁴⁵ This effort to avoid the issue is, however, immediately eclipsed by the Court's next sentence: "Furthermore, the Court cannot lose sight of the fundamental right of every state to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake."¹⁴⁶ This, not some imagined set of circumstances on the high seas, is the real issue of the case.

C. *Nuclear Weapons and State Survival*

If we take seriously the linkage of nuclear weapons and state survival, little remains of the Court's effort to repeat the

142. *Id.* para. 95, 35 I.L.M. at 829.

143. Indeed, the entire case has the quality of the traditional theological question of whether God is bound by the laws of nature. Having created order, is God bound by it?

144. Nuclear Weapons Advisory Opinion, *supra* note 1, para 2, 35 I.L.M. at 1345.

145. *Id.* para. 95, 35 I.L.M. at 829.

146. *Id.* para. 96, 35 I.L.M. at 830.

platitudes of customary humanitarian law. Nuclear weapons are the legacy of the unrestrained warfare of this century's world wars. They are not merely the end-point of a course of technological development, but the ultimate expression of total war. Nuclear war cannot be won without risking everything; it cannot be lost without losing everything. Unlike traditional deployments of force, nuclear weapons place the state itself, and not merely state policy, at issue. That difference renders incoherent efforts to apply the pre-nuclear rules of humanitarian law to nuclear weapons. Those rules were based on a balancing of the value of the political ends for the sake of which states went to war, and of the humanitarian costs of the means of violence deployed. That equation cannot be resolved once states go nuclear: unlimited costs now confront the infinite value of the state.

Nuclear weapons policy begins with Article 51 as a first principle: the principle of state survival. It does not begin with Article 2(4), the prohibition on the use of force. Resolution of the legal issue requires some ordering of these two normative principles. But that is just what international law cannot achieve.¹⁴⁷ The only reconciliation suggested in the Charter itself was in the political operations of the Security Council. Force could be deployed in self-defense, but subject always to peremptory action of the Council.¹⁴⁸ The Council, if properly working, would enforce a legal rule that simultaneously prohibited force and assured state survival. This system of practical, political accommodation was never designed to deal with conflict among the permanent members of the Council themselves, each of which had the authority to terminate the political process through the exercise of the veto. This political stalemate was extended more broadly during the years of the Cold War as the Permanent Members protected their client states and pursued each other in proxy wars. If law were not adequate to guarantee survival, then nuclear weapons would.¹⁴⁹

147. *See id.* para. 2, 35 I.L.M. at 835 (separate opinion of Judge Fleischhauer) ("[T]here is no rule in international law according to which one of the conflicting principles would prevail over the other.").

148. *See* U.N. CHARTER art. 51.

149. *See* Franck, *Who Killed Article 2(4)?*, *supra* note 25.

But the problems run deeper than the failure of an envisioned political accommodation. Article 51 enshrines the principle of self-defense because international law in 1945 could imagine no value higher than the continued existence of the state. If the state's continued existence is the first principle, then there are no limits—apart from practical capacity—on the steps the state will pursue to ensure that end. Nuclear weapons are the ultimate guarantor of that existence. The compulsion to join the nuclear club has been greatest for those states that fear most for their survival—for example, China, Israel, Pakistan, India and North Korea.¹⁵⁰

Nuclear weapons force a kind of choice. In the progressive regulation of warfare—the tradition in which Article 2(4) stands—nuclear weapons are a complete defeat, a regression to war without limits. In the preservation of the state—the tradition in which Article 51 stands—nuclear weapons are the ultimate guarantor. For just this reason, the Court's actual discussion of the law of the Charter—of Article 2(4) and of Article 51—is the least satisfying part of the whole opinion. It reaches no conclusion; it does not even suggest the direction in which an answer might lie.¹⁵¹ This is not just a problem of interpretation of the Charter, which suggested a resolution only through the politics of the Security Council. It is also a problem for customary international law, which shares the Charter's double character and contains no additional resources to resolve the antinomy.

The Court cannot simply reason from the prohibition on the use of force to a prohibition on weapons that are the apotheosis of force because that would require recognition of a value higher than the state. Article 51 stands as a reminder that international law contains no such value.¹⁵² Accordingly,

150. This suggests, for example, a practical contradiction in the sanctions against Iraq. The more Iraq is threatened, the more intense its interest in developing nuclear weapons. To say there is a practical contradiction is not to suggest that it is resolvable. For example, that prisons produce criminals has never been a strong argument for eliminating them.

151. See Nuclear Weapons Advisory Opinion, *supra* note 1, paras. 37-51, 35 I.L.M. at 822-23. See also *id.* 35 I.L.M. at 1349-50 (declaration of Judge Bravo) (locating the conflict between article 2(4) and article 51 in the rise of policies of nuclear deterrence).

152. The political accommodations available to the Security Council might indeed rest on such values. Suppose, for example, that the Council

the Court can do nothing more than suggest that actions in self-defense must meet the standards of customary humanitarian law qualified by a possible exception for "an extreme circumstance of self-defense."¹⁵³ But one cannot have it both ways.

There are effectively two different traditions of customary law that confront the Court. The first is that body of humanitarian law that imagines the battlefield as a subject of legal regulation. This law is designed to cabin the violence by limiting it to combatants who are not to suffer unnecessarily and to reasonable measures in light of military objectives (the principle of proportionality). The second tradition is the law of state survival, i.e., the customary law of self-defense. Both humanitarian principles of warfare and state survival have been articulated as *jus cogens* norms.¹⁵⁴ Confronting nuclear weapons and the policy of deterrence, the Court cannot find any way to reconcile these two bodies of customary law. Unable to appeal to a reconciliation either in legal theory or in the practice of the Security Council, the Court turns to a self-imposed political obligation taken on by the nuclear-weapons states themselves: "It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result."¹⁵⁵ This is surely to end the case with a whimper. In the face of Armageddon, the Court has been rendered substantively speechless by its inability to form a single, coherent position out of the resources of customary international law.

had decided to allow Iraq to keep a section of Kuwait as part of a political accommodation. If Iraq had nuclear weapons, such an accommodation would be a very real possibility. This would raise the interesting question of whether Security Council action under Chapter Seven was subject to legal review by the Court. On this issue, see Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Lib. v. U.S.), 1992 ICJ 114 (Apr. 14) (Request for the Indication of Provisional Measures).

153. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 97, 35 I.L.M. at 830.

154. See *id.* para. 21, 35 I.L.M. at 1347 (declaration of Judge Bedjaoui); Roberto Ago, *Droit des Traités à la Lumière de la Convention de Vienne*, in RECUEIL DES COURS 297, 324 n. 37 (1971).

155. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 98, 35 I.L.M. at 830.

The issue here is not, as Judge Koroma claims in dissent, one of relying on a narrow positivist conception of the law: "[T]he futile quest for [a] specific legal prohibition [of nuclear weapons] can only be attributable to an extreme form of positivism, which is out of keeping with the international jurisprudence—including that of this Court."¹⁵⁶ While there is some of this in the majority opinion, it is not at the heart of the case. After all, even a narrow reading of the 1925 Geneva Gas Protocol,¹⁵⁷ as Judge Weeramantry demonstrates, could extend its terms to nuclear weapons.¹⁵⁸ Conversely, Article 2 (4)'s prohibition on the use of force is hardly a narrowly drawn provision of positive law; nor is the Martens clause, upon which the dissenters rely. The problem for both sides is that of understanding the principles of international law and the place, within them, of the state's right to survive. This is just as much an issue for nonpositivists as for positivists.

Judge Koroma comes much closer to the problem when he accuses the majority of "inventing" a concept of "State survival" which "would constitute an exception to the corpus of humanitarian law which applies in all armed conflicts."¹⁵⁹ This is the critical concept for the majority, but it is hardly their own invention. We will not understand the place of this concept if we simply dismiss it as the product of a narrow positivism. It is no less capable of serving as a first principle of a general international order than any principle put forward by the dissenters. This is the principle we will reach if we approach the international legal order from the perspective of the state whose consensual actions are the origins of the legal norms and the source of their legitimacy. For example, Judge Guillaume, who is the strongest defender of the Lotus principle, writes: "The right of self-defence . . . is characterized by the Charter as natural law This conclusion is easily ex-

156. *Id.* 35 I.L.M. at 932 (dissenting opinion of Judge Koroma).

157. *See* 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

158. *See* Nuclear Weapons Advisory Opinion, *supra* note 1, para. 12, 35 I.L.M. at 907-08 (dissenting opinion of Judge Weeramantry).

159. *Id.* para. 4, 35 I.L.M. at 930 (dissenting opinion of Judge Koroma). Judge Koroma is not fully consistent in describing this concept as a new "invention." He also describes it as "a throwback to the law before the adoption of the United Nations Charter." *Id.* para. 4, 35 I.L.M. at 926.

plained, for no system of law . . . could deprive one of its subjects of the right to defend its own existence and safeguard its vital interests."¹⁶⁰

D. *Customary Law and the Limits of Consent*

Creation of the international legal order by states has not been a charitable act. International law creation has not been an effort by the state to overcome its conception of itself as a permanent historical presence. When international law is understood to impose obligations that entail a sacrifice of the state itself, it has arguably exceeded the boundaries of its own possibility. This was the ground of the Court's resistance to reading conventional law to include a prohibition on nuclear weapons. The turn to customary law at first offered the possibility of overcoming the limits of legitimacy. Yet in the end, the same double perspectives resurface as a conflict within customary law.

Of course, it is possible that states could impose limits upon themselves that entail subordination of the end of state survival to other values, which they judge to be of greater significance. Individual citizens volunteer for military service and other dangerous practices. They consent to a set of values that they deem to be worth the sacrifice. To say that the source of the legitimacy of a claim for self-sacrifice lies in the consenting agent is not an inconsistent proposition. If such an argument is possible, then international law could explain a prohibition on nuclear weapons without ever moving beyond the perspective of state consent. This is the normative concept upon which the majority opinion relies, when it asks states to finish the task of negotiating a complete nuclear disarmament.

The dissenters take up this form of argument, but project the relevant moment of consent into the past, rather than the future. They argue that consent has already been given and thus the nuclear states are legitimately bound by their own past law-making actions. This argument is presented in its sophisticated form by Judge Weeramantry, who argues that before the emergence of nuclear weapons, states had con-

160. *Id.* para. 8, 35 I.L.M. at 1352 (individual opinion of Judge Guillaume).

sented to the principles of prohibition.¹⁶¹ These principles have their origins in the deep past of the major cultural traditions. The very fact of variety among traditions suggests that each state bears a kind of consensual relationship to its *own* culture. The principles emerge from within that culture; they are not imposed from without.

In the modern period, these principles have been expressly consented to in the Martens Clause. The Martens Clause, according to Weeramantry, effectively marks a point beyond which it can no longer be argued that customary practices have not yet "crystallized" into legal norms. "The Martens clause clearly indicates that, behind such specific rules as had already been formulated, there lay a body of general principles sufficient to be applied to such situations as had not already been dealt with by a specific rule."¹⁶² Thus he reads each of the conventional-law expressions of humanitarian law as an expression of consent to general principles of customary international law. For Weeramantry, it is not the case that states merely consented to a ban on dum dum bullets in 1899. Rather, the International Declaration Respecting Expanding Bullets is proof of the fact that "international law had principles within it strong enough in 1899 to recognize the extraordinary cruelty of the 'dum dum' or exploding bullet as going beyond the purposes of war."¹⁶³

There is an immediate problem with this argument: The nuclear-weapons states do not themselves believe that they have consented to such a prohibition. Their practice for decades has indicated that they perceive no such legal contradiction in their behavior. Thus, the analogy to the volunteer army does not carry us very far. The soldier who does not consent presently and does not believe that he ever expressed his consent looks more like a conscript than a volunteer. At most

161. *See id.* para. 4, 35 I.L.M. at 899-900 (dissenting opinion of Judge Weeramantry). Judge Weeramantry also presents a sophisticated form of the argument that the prohibition on nuclear weapons is a necessary conceptual condition of any international legal order, quite apart from any expression of consent. *See id.* para. 4, 35 I.L.M. at 914.

162. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 3, 35 I.L.M. at 899.

163. *Id.* This is the same interpretive approach that he brought to the Geneva Protocol on Poisonous Gas. *See supra* note 158 and accompanying text.

we could offer a theory of tacit consent, by which we could seek to prove that by consenting to some other proposition, he also consented to military service without fully realizing it. Tacit consent arguments are always weak, and this is the weakest version of such arguments.¹⁶⁴ As the demands on the consentor become greater, more—not less—should be demanded of the clarity and explicitness of consent. This is true at least as long as consent is the normative ground of the obligation.

That I may be willing to pay some price for a good is hardly indicative of my consent to pay any price for that good. That a state may be willing to consent to some limits on ordinary warfare does not suggest that it is willing to sacrifice its existence for some value independent of the existence of the state. The greater claim cannot follow as a matter of “consent” from the weaker claim. This, however, is just the form of the argument that Weeramantry offers: “[I]t would seem passing strange that the expansion within the body of a single soldier of a single bullet is an excessive cruelty which international law has been unable to tolerate since 1899, and that the incineration in one second of a hundred thousand civilians is not.”¹⁶⁵ But it is not a personified “international law” that does anything and it is hardly strange that particular states would agree to the lesser limitation—which does not threaten their existence—but not to the greater.

The claim that the greater includes the lesser is a characteristic form of legal argument. If a state can send someone to jail for violation of the law, then it can sentence him to probation. If it can levy a large fine, it can levy a small one. Article 2(4)’s prohibition on the use of force, for example, clearly covers invasion by conventional forces and, therefore, reasonably extends to deployment of unconventional forces as well.¹⁶⁶ But in the nuclear weapons case, the argument runs the other way. If states have taken some steps with the goal of rendering warfare more humane, how can they not have prohibited the

164. See, e.g., ALAN JOHN SIMMONS, *ON THE EDGE OF ANARCHY: LOCKE, CONSENT AND THE LIMITS OF SOCIETY* 80-90 (1993).

165. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 3, 35 I.L.M. at 899 (dissenting opinion of Judge Weeramantry). He goes on to state the general principle: “If humanitarian law regulates the lesser weapons for fear that they may cause . . . excessive harm . . . it must *a fortiori* regulate the greater.” *Id.* para. 4, 35 I.L.M. at 900.

166. See Nicaragua Case—Merits, *supra* note 43, at 118-19.

most inhumane form of warfare? If they have taken some steps to save mankind from the destructive consequences of warfare, how can they not have prohibited that class of weapons the use of which will destroy civilization? What is the point of limiting the use of poisonous gas, if nuclear radiation is not limited? In the face of a threat of Armageddon, what is the point of worrying about attacks on human dignity, ethnic groups or the world environment? Unless the lesser includes the greater, the lesser itself is emptied of any significance. "To accept as lawful the deliberate terrorization of the enemy community by the infliction of large-scale destruction comes too close to rendering pointless all legal limitations on the exercise of violence."¹⁶⁷ That a legal limitation might be rendered "pointless" by the ultimate self-understandings of the state, however, is hardly an argument that defeats those understandings or creates law.

One response to this argument that the lesser does not include the greater is to cast existing prohibitions within a narrative of progress. Thus, the lesser does not already include the greater, but existing regulations are steps toward an ultimate regulation. They are indications of a source of international concern which is being addressed progressively. The justification informs the end-point of this tale of progress, but that end-point still lies in the future. The Court accepts this argument when it insists that the nuclear weapons states stand under an obligation to negotiate a "complete nuclear disarmament."¹⁶⁸ It insists on making this argument, even though it has no easy way of including it in its judgment and it risks appearing as mere dicta. It is not dicta, in the Court's view, because it is the principle that gives sense to the existing regulations on the use of force. The ideal of progress dissolves the tension between law and politics, as well as that between legitimacy and justification. In his dissent, Vice-President Schwebel expresses this tension and its resolution in a narrative of progress: "[T]his proceeding presents a titanic tension between State practice and legal principle. It is accordingly the more

167. MYRES S. McDOUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 657 (1961).

168. Nuclear Weapons Advisory Opinion, *supra* note 1, para. 98, 35 I.L.M. at 830.

important not to confuse the international law we have with the international law we need.”¹⁶⁹

While the appeal to progress is convenient and reassuring, it seriously distorts the relationship of the modern nation-state to international law. It assumes that international law is an effort by the state to overcome the limits of the state, that the central problem of an international legal order is the state itself. The state appears as the threat of self-interest to the development of a legal order based on reason. Substantively, progress in the law means movement from the bias of self-interest to the universal perspective of reason. Institutionally, progress means a shift away from decentralized state decision-making authority and an increasing role for centralized, decision-making mechanisms of an international legal order, e.g., an international legislature and international courts. The state-centered view of classical international law is correspondingly seen as a “primitive” legal order.¹⁷⁰ A fully “mature” international legal order would be one in which the state had overcome the partiality of its own self-interested perspective and fully adopted a transnational perspective.

The appeal to progress as an internal norm of the international legal order is accompanied by a belief that progress in international law is as “natural” as progress in the sciences. Every addition to our store of scientific knowledge leads to further questions and new insights. Analogously, having entered into a legal ordering of international relationships, states will be drawn to a course of progressive development of this law.¹⁷¹

169. *Id.* 35 I.L.M. at 836 (dissenting opinion of Vice-President Schwebel).

170. See, e.g., David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 137-38 (1997):

As civilization progresses from primitive to modern by centralizing government and law in a state apparatus, so also international law will develop by solidifying its cooperative machinery. The nineteenth century of disengaged philosophical surrender to sovereignty will also evolve toward pragmatic cosmopolitanism. Modern international law orients the formal and the pragmatic in a natural trajectory, from legal paganism to a redemptive pragmatism.

Id.

171. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 199 (1996):

Even resisting nations cannot insulate themselves forever from complying with international law if they regularly participate, as all nations must, in transnational legal interactions. Thus, in the same

This is the view that sees our past century as one of "progressive" growth of international law, and sees the wars we have suffered as "accidental" moments of backsliding. But, of course, it is simply not plausible to describe the central political features of the century as accidental distractions from a plot-line imagined by the legal scholar.

VI. CONCLUSION: LAW AND POLITICS

Three times in the nuclear weapons case the Court confronts the same contrast between legitimacy and justification: in its approach to conventional law, to the U.N. Charter, and to customary law. Each time, it finds itself unable to state as a matter of law what may seem an obvious proposition of common sense: If international law protects any common values of humanity, it must prohibit weapons that threaten to destroy civilization itself. The Court cannot reach this conclusion because the arguments from legitimacy, which insist on the primacy of the sovereign state, cannot be subordinated to this argument from justification, even when civilization hangs in the balance.¹⁷²

International law scholars are inclined to look at this situation as transitional. For them, the normative problem is to remove from international law the remaining vestiges of the classical view of state sovereignty and to pursue in their place the transnational values of human rights, group rights, and environmental protection. This century of war and law is cast as a story of progress toward the triumph of law over violence. Violence has its source in the system of state sovereignty, which, from the perspective of a progressive international law,

way that the United States finally abided by the ABM Treaty, the Soviet Union finally conceded that its invasion of Afghanistan was illegal. Through a complex process of rational self-interest and norm internalization—at times spurred by transnational litigation—international legal norms seep into, are internalized, and become entrenched in domestic legal and political processes. In this way, the "normativity of transnational legal process" helps drive how national governments conduct their international relations.

Id.

172. President Bedjaoui expresses this dilemma for the Court: "The Court had a duty to play its part . . . in this rescue operation for humanity; it did so . . . bearing in mind the limits imposed upon it by both its Statute and by the applicable international law." Nuclear Weapons Advisory Opinion, *supra* note 1, para. 6, 35 I.L.M. at 1345 (declaration of President Bedjaoui).

is a pathological condition of the international order. These scholars appeal by analogy to a domestic-law model that offers a two dimensional account of violence, referring to the sociopathic character of the individual and to failures in the institutions of criminal justice. Similarly, state recourse to violence appears as a failure in the international socialization of the state's political institutions, which continue to act on a pathological desire for power.¹⁷³ That the state can act on such illicit desires is made possible by the weakness of the institutions for international-law enforcement.

This is a model of rules and legal enforcement: establish the speed limit, teach compliance with law as a virtue, send out the police to arrest violators, and convict them in a court of law. The same must be true of international law if it is to function as a "mature" legal system. Yet with international law it never seems quite so easy. The behavior to be controlled too readily slips the bounds of law; the enforcement mechanisms seem to arrive too late and to accomplish too little. By the time people go to war, the threat of future law enforcement actions may be too distant and too small to have much effect on their behavior. This remains as true of Bosnia and Rwanda as it was of the Third Reich.

For two generations now, international-law scholars have been fighting a constant battle with those who believe that international relations are governed by interests and force, rather than law and justice. They have sought to establish that international law is not like Clausewitz's vision of war: politics

173. See Kennedy, *supra* note 170, at 135-36:

The internationalist avant-garde situates him or herself after sovereignty, as a centrist opposed to both legal utopianism and surrender to an absolute sovereign discretion, reaching out to political science, confident in the flexible practices of pragmatic reasoning, in balancing, and in the universal liberal principles of reasonable accommodation, reciprocity, and fairness. This cosmopolitan posture experiences itself as progressive, building an international order. If you assert the rights of sovereignty, insist on sovereign prerogatives, hold to territorial inviolability, and reject the fluid partnership of public and private actors, then the mainstream international lawyer will have to admit that the law is on your side. But that is all that will be admitted—one can almost hear the sigh, "You are of course, within your rights, but out of step with history's march toward a more pragmatic and cosmopolitan world."

Id.

continued by other means. But the problematic character of the nuclear weapons case is a product of the impossibility of separating law from politics when we turn to first principles. This is not politics in the narrow sense of factional interests, but politics in the grandest sense of conflict over fundamental principles. The case forces us to recognize the uncertainty and ambiguity about the deepest truth of international law. At this point in history, we simply do not know how to evaluate the sovereign nation-state within the international legal order. We do not know whether it is the problem to be overcome or the source and foundation of the law. This is a question to which only a political answer is possible. It is a question about our conceptions of self, state, and community at this moment in history.

In retrospect, two mistakes were made in the nuclear weapons case. First, there was the mistake of those who brought the case. They sought a judicial decision as a kind of end run around the political stalemate that had emerged in the negotiations over nuclear disarmament. But it was surely wrong to believe that a shift of forum would result in a shift of real political power. True, the great powers cannot get away with simply whatever they want before the Court, as if their military or economic power is reflected immediately in legal outcomes. The Court did rule against the United States in the Nicaragua case. Yet, there is a world of difference between that decision, asserting the rights of a small state in the face of intervention by a superpower, and a judicial assertion of law that could be perceived to touch on the very existence of a state—particularly a superpower.

Second, it was a mistake for the Court to have agreed to issue an opinion. The Court is so accustomed to repeating the proposition that the clarification of legal rights and responsibilities may aid in the resolution of political disputes that it did not fully think through the inseparable character of law and politics in this matter. With nuclear weapons, law reaches both its limits and its foundation in the nation-state. The Court really could have nothing useful to say to the decision makers, because nuclear policy is already located at the very edge of survival: of individuals, states, civilization, and the globe.

There is always a risk of pretension in the legal voice: the pretension that law's empire knows no limits. The nuclear

weapons case shows us that there really are limits. The decision ends in an embarrassing silence, broken only by the Court adding its plea to that of millions of others, that the nuclear-weapons states should get on with the business of negotiating an end to the nuclear confrontation. At this level, however, the Court's voice is no louder or more convincing than that of anyone else. Law adds little to the moral issue. To think that law could be more compelling than morality was simply wrong. To think that law could work an end run around the political difficulties of the issue is just the mistake made by those seeking the decision.

Yet the decision to appeal to law may have been even worse than these double mistakes suggest. For in taking up the problem, the Court was forced publicly to acknowledge the poverty of legal resources available to support the morally compelling result. Confronting the first principles of international law, it could not find a way unequivocally to condemn nuclear holocaust. Not only could it not condemn the possibility, it had to recognize that such an act may be within the law. At the end of the opinion, we are forced to realize that we are still very much a part of this century of war and law. If the opinion did not teach this to the legal scholars, perhaps the recent nuclear weapons tests by India and Pakistan did.

There are two possibilities for a future of international law more compelling than its past. Perhaps we are in a period in which the nation-state as the central community of political identification is dying. If so, then it may be that a new internationalist community will emerge which will make a direct claim on citizen identity. Something like this may be happening already in Europe, although this hardly seems a world-wide phenomenon.¹⁷⁴ Alternatively, it may be that we are moving into an age in which political identifications and political communities are simply less important. The growth of an international civil society suggests that not just the age of the nation-state, but the age of sacrificial, militarized politics may be ending. The individual of the future may be a consumer in an international market, rather than a citizen of a militarized nation-state.

174. The break up of the Soviet Empire may suggest movement in just the opposite direction.

In a world of international consumers, nuclear weapons are wholly without purpose. I have argued that such weapons express the logic of the modern nation-state. But in a world in which political identity is no longer a matter of ultimate meaning, there is no place for weapons of ultimate destructive power. In such a world, the threat of nuclear weapons is not that a state will use them, but that a terrorist—i.e., a non-state actor—will use them. Perhaps terrorists will be the last political actors in the new world. In a world beyond politics, the terrorist's very willingness to engage in the traditional forms of sacrificial politics, giving up his own life and making a total claim on others, looks like a pathological condition to be explained psychologically. Politics will no longer be taken seriously as its own form and source of meaning.

If the nation-state brought us to a regime of nuclear weapons, then perhaps the passing of the age of politics will be a good thing. What has been most amazing, and most in need of explanation, has not been the technology of these weapons but the political imagination that conceived of their acquisition and use. I do not doubt that for many of us entering into this new world order, this imaginative possibility is disappearing. These weapons appear as a technological anachronism to be gotten rid of as fast as possible. We identify with the Court's plea that their ultimate disposal be negotiated as quickly as possible. Yet, we cannot say that the end of our political horizon is the end of politics for everyone. To the degree that a politics of sacrifice emerges anywhere, then nuclear weapons will have a purpose and cogency. A world of markets has no need of such weapons. But whether markets will overcome politics everywhere cannot be known in advance.

My own suspicion is that people need a culture that provides them a meaning worth dying for. For many in the modern era, politics replaced religion, but served the same end of providing an ultimate meaning. Where future generations will locate their ultimate meanings, we cannot guess. But we can be fairly certain that when politics provides people with an ultimate meaning, this will be the point of greatest danger for self and other. Nuclear weapons are likely to find a natural home just at that point, regardless of our best efforts to do away with them.

WEAKENING THE PRINCIPLE OF SOVEREIGNTY IN INTERNATIONAL LAW: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

ANNE BODLEY*

I. INTRODUCTION

At least in theory, a fundamental rule of international law has been the ultimate and indivisible sovereignty of states. This principle, however, is weakening, as illustrated by the establishment of the International Criminal Tribunal for the former Yugoslavia (the International Tribunal or Tribunal) under Chapter VII of the U.N. Charter.¹ The Tribunal has the ability to conduct investigations in the territory of sovereign states, to issue criminal indictments against their citizens, and to extradite them for trial in The Hague before sentencing them to prison terms, if they are found guilty, served outside the territory of their homeland.

In January 1997, the International Tribunal's Judge Gabrielle Kirk McDonald issued two *subpoenae duces tecum*, one to the Republic of Croatia and one to its Defence Minister in *Prosecutor v. Tihomir Blaškić*.² Although the *subpoenae* were quashed on appeal, in substance the rule was confirmed that

* J.D., New York University School of Law, expected May 1999. B.A. *summa cum laude*, University of Minnesota, June 1993. Legal intern, International Criminal Tribunal for the former Yugoslavia (ICTY), Summer 1997. The author would like to thank Professor Thomas Franck for his direction and support in the writing of this Note.

1. The full title of the International Tribunal is the "United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991." See S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993). The Statute and the Rules of Procedure and Evidence of the Tribunal are reprinted in INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, BASIC DOCUMENTS/ DOCUMENTS DE REFERENCE (1995) [hereinafter BASIC DOCUMENTS].

2. *The Prosecutor of the Tribunal against Dario Kordić, Tihofil also known as Tihomir Blaškić, Mario Čerkez, Ivan also known as Ivica Santić, Pero Škopljak, Zlatko Aleksovski*, Case No. IT-95-14 (visited Mar. 5, 1999) <<http://www.un.org/icty/>> [hereinafter *Blaškić case*].